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Supreme Court of [redacted]

[redacted]

October Term, [redacted]

[redacted]

No. [redacted]

[redacted]

BARBARA J. [redacted],
Arthur J. [redacted],

Petitioners,

v.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S,

[redacted]

PETITION FOR WRIT OF [redacted]
UNITED STATES [redacted]
FOR THE SIXTH CIRCUIT

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, ET AL.,
Petitioners,

v.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Barbara J. Fuhrman, Administratrix of the Estate of Arthur J. Fuhrman, deceased, Marion Jones, Administratrix of the Estate of Eugene F. Jones, deceased, Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Stanley P. Mulka and Ronald G. Piechan, respectfully pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled matter on December 23, 1970.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, is unreported (*infra*, p. A3). The opinion of the Court of Appeals for the Sixth Circuit is reported at F. 2d (*infra*, p. A8).

JURISDICTION.

The judgments of the Court of Appeals were entered on December 23, 1970 (*infra*, p. A 52-57). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. Where, in an admiralty proceeding to assess damages for death and personal injury from a maritime disaster, there is factual and medical testimony concerning the collision and sinking, the injuries sustained, and the losses suffered, and the damage Commissioners, who saw and heard the witnesses, and the District Judge, made findings of fact thereon, did not the reviewing court act in direct conflict with the decision of this Court in *McAllister v. United States*, 348 U. S. 19 (1954), and with the decisions of other circuits [1] in applying F. R. C. P. 52(a) and the "clearly erroneous" rule, by completely disregarding said

1. Second Circuit: *Carroll v. United States*, 133 F. 2d 690 (1943); *Castro v. Moore-McCormack Lines, Inc.*, 325 F. 2d 72 (1963).

Fifth Circuit: *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011 (1969); *Daniels Towing Service, Inc. v. Nat Harrison Assoc.*, 432 F. 2d 103 (1970).

findings of fact, despite the admittedly existing evidence, because it disbelieved testimony which was accepted below and disagreed with the findings of fact based thereon?

2. Did the Court below err in completely setting aside all of the psychiatric testimony which was accepted and considered by the Trial Judge because it found the testimony "incredible" and because this expert testimony was based upon history given by the claimants to the physician, which holdings are in direct conflict with the law enunciated by the Second,[2] Seventh,[3] and District of Columbia[4] Circuits, which hold that a physician who examined for purposes of testifying may properly state the history given to him as basis for his conclusion?

3. Did the Court below err in measuring the seamen's future loss of earning capacity resulting from maritime disaster by taking the actual earnings before and after the injury, and basing it on actual loss of *earnings*, rather than on earning *capacity*, and thereby announce a rule which limits losses to the past and immediate present earnings, rather than considering the "whole economic horizon" of the claimant and "all relevant factors" as is held to be the law in the Second,[5] Third,[6] Fourth,[7] and Eighth[8] Circuits.

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2. *Reid v. Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34 (2d Cir. 1965).

3. *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (7th Cir. 1963).

4. *City-Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (D. C. Cir. 1962); *Kauffman v. Kauffman*, 164 F. 2d 519 (D. C. Cir. 1947).

5. *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.*, 298 F. 2d 918 (1961); *Sylvestri v. Warner & Swasey Co.*, 398 F. 2d 598 (2d Cir. 1968).

6. *Wiles v. N. Y., C. & St. L. R. R.*, 283 F. 2d 328 (3d Cir. 1960); *Thompson v. Trent Maritime Co.*, 353 F. 2d 632 (3d Cir. 1965); *Johns v. Bal. & Ohio R. R.*, 239 F. 2d 385 (3d Cir. 1957).

7. *Lawrence v. Norfolk Dredging Co.*, 319 F. 2d 805 (4th Cir. 1963); *Carter v. United States*, 49 F. 2d 221 (4th Cir. 1931).

8. *United States v. Phillips*, 44 F. 2d 689 (8th Cir. 1930).

4. In vacating in full awards to the widows of deceased seamen for loss of consortium, care and guidance, did not the Court below misconceive and misapply the decision of this Court in *Michigan Central R. R. v. Vreeland,* 227 U. S. 59, 57 L. Ed. 417 (1913), wherein this Court recognized that "pecuniary loss" includes damages for "loss of services . . . care, counsel, training and education" which the wife or child might have reasonably received?

5. Where there is evidence of future decrease in the purchasing value of the dollar, did not the Court below err in overruling the trial court by refusing to consider this evidence of inflationary trend when reducing future damages to present value; was not such reversal of the District Court's counter-balancing the earning power of money with its actual purchasing power in conflict with the decision of this Court in *C. & O. Ry. v. Kelly,* 241 U. S. 485, 60 L. Ed. 1117 (1916)?

6. Did the Court below err in vacating the Trial Court's award of pre-judgment interest in admiralty and thereby failing to follow the principle enunciated by the Second Circuit?[9]

STATUTES AND RULE INVOLVED.

The statutory provisions involved are Merchant Marine (Jones) Act, 46 U. S. C. A. 688; Federal Employers' Liability Act, 45 U. S. C. A. 51. The procedural rule involved is F. R. C. P. 52(a). They are printed in Appendix A, *infra,* pp. A1-2.

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9. *Petition of City of New York,* 332 F. 2d 1006 (2d Cir. 1964); *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (2d Cir. 1961).

STATEMENT OF THE CASE.

On May 7, 1965, the S/S "Cedarville", owned and operated by United States Steel Corporation, departed Calcite, Michigan, in fog. Because of the negligence of U. S. Steel and Den Norske and the unseaworthiness of their vessels, the "Cedarville" came into collision with the M/S "Topdalsfjord", owned and operated by Den Norske, and a great gash was torn in the "Cedarville" so that her non-watertight compartments immediately started to flood and she started to sink at the rate of three inches per minute (R. 130a, 226a, 245a-246a, 316a-317a). After 15 minutes while the vessel was anchored, the vessel had lost about five feet of her freeboard (R. 201b). Another vessel, the M/V "Weissenburg", was standing by the stricken "Cedarville", vainly asking to take the crew aboard, but the master of the "Cedarville" refused (R. 391a-393a) and took a "gamble" in trying to reach shore in the fog (R. 247a, 391a-393a). During this period of time the "Cedarville" was in touch with shore officials of U. S. Steel by ship-to-shore radio. In this attempt, the "Cedarville" was traveling at the rate of two miles per hour (R. 179b). The men not on watch below were standing on the deck waiting for the order to abandon ship, which never came (R. 244a, 339a, 390a, 169b, 173b, 226b-227b). As the vessel proceeded at its snail's pace, the water came higher and higher to the ship's decks until the decks came awash. Still no order to abandon ship (R. 255a, 317a, 342a, 179b). The ship then convulsed, 40 minutes after the collision, turned over on its side, and sank, hurling most of the men into the icy waters, and taking with her those who were mercilessly trapped below. No order to abandon ship was ever given (R. 340a, 371a, 381a, 220b, 238b).

Being flung into the water was the climax for this crew, after watching the ship go down until her decks were

awash. They all faced death and were terror stricken. They struggled in the freezing water—for about 30 minutes, in the fog, until they were finally able to get aboard the life raft or the lifeboat. Sometime later they were found and taken aboard the "Weissenburg" (R. 399a, 479a, 207b, 221b, 223b).[10]

The surviving crewmen testified at length upon the issue of their damages. They told about their lives before the disaster, including their schooling and employment and pre-collision illnesses and injuries; the events and ordeal of May 7, 1965, their physical, emotional and mental conditions immediately after rescue, their medical treatment and convalescence, their physical, mental and emotional conditions and their lives and employment since the collision, comparing this with their pre-collision situations and their current conditions and disabilities.[11] The families

10. Claimants here demanded punitive as well as consequential damages. After extensive pre-trial discovery the defendants admitted their negligence and the unseaworthiness of their vessels, and the case went to trial on the count for punitive damages against U. S. Steel directly before the District Judge (as the Commissioner's hearings on compensatory damages proceeded). The District Judge found U. S. Steel guilty of willful, wanton misconduct as to both pre- and post-collision events and held said company liable for punitive damages. — F. Supp. — . The Court of Appeals for the Sixth Circuit reversed, holding that the "master's" actions were neither authorized nor ratified by U. S. Steel. 407 F. 2d 1143. This Court denied certiorari. *Fuhrman v. U. S. Steel Corp.*, — U. S. —, 26 L. Ed. 2d 542 (6/15/70).

The foregoing capsulization of events up to the sinking is based on the Record in said punitive damage proceeding. Record references in the next footnote and elsewhere in this Petition are to Appendix below in the instant proceeding. Page references preceded by "A" are to Appendix *infra*.

11. Holley, R. 1009-11, 1012; 1012-16; 1016-18; 1016-22; 1018-24; 1024-30.
Idalski, R. 1353-54, 1365; 1355-57; 1357-59; 1360-64; 1364-66; 1365-66.
Kierzek, R. 842-43; 844-48; 846-49; 847-48; 848-51, 867-68; 847, 848-52, 855, 868.
Mulka, R. 913-14; 914-17; 917-20; 917, 921, 920, 921, 922-24; 922, 924.

of those who did not survive the disaster testified about their decedents' lives, their schooling and past employment, their health and ambitions, their economic existence, and their family and home lives together, and relationships between husband and wife and father and child.[12]

Dr. Harold Dillon, an eminent neuropsychiatrist, examined and testified on behalf of the survivors. His high standing and qualifications in his specialty are not denied. He examined each of the survivors at length several times, and spoke, also, with some of their families. He testified as to his early and final conclusions as to each claimant, and gave his final diagnosis, explaining the basis for each. He also gave his opinion as to prognosis and future disability and any necessary or recommended treatment, stating the length of time and cost for each claimant.[13]

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11 (cont'd)

Piechan, R. 1164-66; 1165-70; 1169-71; 1170-72, 1173-74; 1172-75; 1174-77.

Przybyla, R. 1236-37; 1238-40; 1240-41; 1240-41; 1242-45, 1270-73; 1244-47, 1261, 1269-74, 1286.

Tulgetske, R. 1523-24; 1525-29; 1529-31; 1529-30, 1532; 1531, 1532-34, 1536, 1557; 1531, 1532, 1534-35, 1536, 1550, 1557.

12. Fuhrman, R. 492-508, 520, 526-28.
Haske, R. 19-20, 532-56, 573-77.
Jones, R. 581-97, 614-16.

13. Dr. Dillon is certified by the professional Boards in neurology and psychiatry. He is Chief of Psychiatry, University of Pennsylvania Division of Philadelphia General Hospital, and on the psychiatric staff of four hospitals; psychiatric consultant to the Peace Corps, the Veterans Administration and Pennsylvania Bureau of Vocational Rehabilitation. He is assistant professor of clinical psychiatry at University of Pennsylvania.

In its zeal to devalue the fact-findings of the Trial Court, the Court of Appeals committed serious error in adopting the completely irrelevant and unsupported view of a commissioner, in a case completely unrelated to the instant one. The Court of Appeals below adopted *in toto* the argument of U. S. Steel that Dr. Dillon was incredible because of what a commissioner had said in another case in Seattle, Washington: *Matter of Petition of Keystone Tankship Corp.*, In Admiralty, No. 16,994, W. D. Wash., No. Div. (The "Bunker Hill") (A14). Since the subject matter was opened by

Dr. Jacob Krause testified on behalf of Holley, Idalski, Piechan, Przybyla and Tulgetske. Dr. Krause's qualifications were not denied, either.[14] He examined the above claimants, had x-rays taken where necessary, and testified as to diagnosis and prognosis in each case, giving his opinion as to required treatment and future disability.

The two Commissioners, having seen and heard all of the fact and medical witnesses in extended hearings, filed their reports and recommendations (R. 61-155). The District Judge considered exceptions filed by all parties, and promulgated the Commissioners' Awards and Opinions and their findings of fact and conclusions of law as those of the Court, and entered said awards as judgments for all parties (A3-6). Accordingly, judgment was entered (A7).

The Court of Appeals, after actually retrying the facts found in the District Court, vacated absolutely the awards for certain losses, and remanded the cases for revision and re-evaluation downward of others. It made broad and substantial reversals in law, as well as in weight, sufficiency and competency of evidence. Nevertheless, the Court in-

13 (cont'd)

the Court below it is appropriate to make brief reference to that case in order that an eminent and reputable specialist be not irreparably damaged. The commissioner in the Seattle case was a practicing attorney, representing steamship and insurance companies. He was outraged at Dr. Dillon's testimony that each of the men was affected. So he asked the insurance company doctor if he agreed that all of the men could be affected. The insurance doctor answered "Yes", agreeing with Dr. Dillon. Notwithstanding this, the commissioner there castigated Dr. Dillon in a most unjust and irrelevant manner. Adopting, in this case, the credibility evaluation of a witness by a commissioner in another litigation, and thereby reversing the credibility evaluation by the Trial Judge in *this* case, is a shocking mode of appellate review.

14. Dr. Krause is certified by the American Board of Orthopedic Surgery. He is Assistant Professor of Orthopedic Surgery at Hahnemann Medical College, and is Assistant Chief in Orthopedics at Albert Einstein Medical Center.

structed the District Court to make its revised findings and re-evaluations on the basis only of the present record, after deletion of the extensive and substantial evidence which it found incompetent, including all of Dr. Dillon's testimony, with no leave to claimants to offer additional evidence based upon its revised version of the law (A8-51, A52-57).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Action of the Court Below in Setting Aside the Fact Findings of the District Court Despite Supporting Evidence, Because the Court Disbelieved Such Evidence and Disagreed With the Findings Thereon, Was a Complete Misapplication of F. R. C. P. 52(a) and the "Clearly Erroneous" Rule, and in Direct Conflict With This Court's Ruling in McAllister v. United States, 348 U. S. 19 (1954), Which Held That Where There Is Evidence to Support the Trial Judge's Findings, by Balance of Probabilities and Inference, Such Findings Cannot Be Held on Review to Be Clearly Erroneous.

The Court of Appeals simply stated that the awards were excessive and it was therefore dissatisfied with the findings of fact made by the District Judge. It considered the claimants' ordeals, suffering and losses of much less significance than did the finders of fact, and disbelieved the psychiatric testimony, although the fact-finders believed it. But, giving voice to a recognition that the reviewing tribunal was not the proper judge of credibility, the Court decided that it was firmly convinced "that a mistake has been committed", and, further, that Dr. Dillon's testimony was inadmissible.[15] Such indirection by the Court below in order to give effect to its disbelief of witnesses who were believed by the proper fact-finder, was a total and substantial misuse of F. R. C. P. 52(a) and the "clearly erroneous" rule as implemented and applied by this Court.

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15. Thus, the Court below stated that its inclination to discredit the psychiatric testimony was strong (A14), but being by law "required to accept that testimony unless we possess . . . a definite and firm conviction that a mistake has been committed" (A14), then proceeded to evade the law by deriving such "definite and firm conviction" from this very disbelief and "dissatisfaction with this testimony" (A14-16). As discussed, *infra*, this *ratio decidendi* grossly violates the law as announced by this Court.

This Court had the present issue before it in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20 (1954). There, the District Judge, sitting in admiralty without a jury, found that the Government, as shipowner, was negligent in permitting stevedores in a foreign port which was plagued by polio to use facilities aboard the ship, and that the plaintiff seaman thereby contracted the disease. The Court of Appeals held such findings to be "clearly erroneous". This Court reversed, holding that since there was evidence in the record from which the fact-finder could reasonably infer the facts which he found, the judgment of the trial court was "allowable". This Court said that while the Court of Appeals in that case had stated and applied the proper standard, it had applied it incorrectly and thereby reached the wrong result, in view of the existence of evidence in the record "from which the District Court could and did find" as it did (U. S. at 22, L. Ed. at 25). This Court concluded (U. S. at 22-3, L. Ed. at 25):

> "Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. *But upon balance of the probabilities it seems a reasonable inference* for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. Myers v. Reading Co., 331 U. S. 477, 485, 486, 91 L. ed. 1615, 1619, 1620, 67 S. Ct. 1334; Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, 15 NCCA NS 647. *We think it was an allowable judgment of the District Court*, and

the judgment of the Court of Appeals is Reversed.'"[16] (Emphasis supplied.)

Pertinent to this principle is the basic rule that the amount of a verdict is *purely a question of fact. Dimick v. Schiedt,* 293 U. S. 474, 486, 79 L. Ed. 603, 611 (1935); *St. Louis, I. M. & S. R. R. v. Craft,* 237 U. S. 648, 661, 59 L. Ed. 1160, 1165 (1915).

The Fifth Circuit recently emphasized that the *McAllister* rule draws a distinct line between fact-finder and reviewing tribunal. In *Grigsby v. Coastal Marine Service of Texas, Inc.,* 412 F. 2d 1011 (5th Cir. 1969); reh. den.[17] in an exhaustive opinion on appeal from the findings and judgment of the District Judge, Chief Judge Brown said (1020):

> "The first is that as so often, the briefs on the part of the respondent-appellants 'cannot resist the natural temptation to reargue the facts from a point of view favorable to [each of them], although now adversely determined by the trial Judge.' . . . Counsel, experienced and able as they are, trying valiantly to formulate it in the mold of 'clearly erroneous' 'now incrusted on the hull of maritime jurisprudence,' . . . simply refuse to recognize, even at this late date, 'that in this kind of controversy [the] functions of the courts in the judicial hierarchy are distinct and different' and we would 'undermine the vitality of the system by a too-quick meddling in the principal business of a trial court.

16. This decision emphasizes the general obligation of the reviewing court to draw all inferences favorable to the appellee that can be drawn from the evidence, and that the findings below must be deemed presumptively correct. *Seifert v. Solem,* 387 F. 2d 925, 929 (7th Cir. 1967); *Grigsby v. Coastal Marine Service,* 412 F. 2d 1011, 1020 (5th Cir. 1969).

17. The Chief Justice, then of the District of Columbia Circuit, sat on this panel by designation.

> ** * * A trial of a hotly contested, sharply disputed case is the task of a trial court' and reviewing courts 'even in admiralty * * * should be slow to overturn fact decisions made by the judge before whom the facts are annealed through the hammering, heating process of vigorous, running advocacy.'* . . . Indeed, we must constantly remind ourselves of our distinctive roles. 'If we were to approach it as simply a question—how should this case be decided?—we would effectually bypass a trial court. The problem faced is more nearly that of determining whether the trial judge, faced with the choice—often hard choices between competing versions of simple or complex occurrences—has fairly weighed the matter and has reached a conclusion which seems substantial and reasonable even though another result might have been achieved either by him or others.'" (Emphasis supplied.)

More recently, the same Court expressed the pith of the *McAllister* principle to be:

> "In short—we just don't retry cases here."[18]

The Second Circuit has been similarly adamant upon this issue, even where it expressed specific disagreement with the Trial Judge's findings and award of damages. In *Carroll v. United States,* 133 F. 2d 690, 693-94 (2d Cir. 1943), an appeal in admiralty from an award of damages to a seaman, Judge Learned Hand said that the award was "larger than we should have been disposed to make, had the original decision been ours". But, evidence supporting this award was in the record. "That being so", said Judge Hand, "the judge's choice must stand, whatever our personal doubts. . . ." The same Court made it clear that

18. *Daniels Towing Service, Inc. v. Nat Harrison Assoc.,* 432 F. 2d 103, 105 (5th Cir. 1970).

the effect of a fact-finding by a Trial Judge in admiralty is entitled to no less weight than the verdict of a jury. In *Castro v. Moore-McCormack Lines, Inc.*, 325 F. 2d 72 (2d Cir. 1963), the Court said (74):

> ". . . If the case had been tried to a judge and jury, and the jury had rendered a verdict for defendant on the issue of unseaworthiness, on proper instructions, we would have had no alternative other than to affirm the judgment entered on the verdict. Blier v. United States Lines Company, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836, 82 S. Ct. 32, 7 L. Ed. 2d 37. Surely we are not to hold that a jury verdict on such a question is entitled to more weight than the finding of a judge who has demonstrated that he was applying the governing legal standard. See Morales v. City of Galveston, 1962, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 412 . . . "[19]

This Court has consistently held that, unless there is complete absence of evidence to support the jury's verdict, the appellate Court may not interfere therewith. In *N. Y., C. & H. R. R. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531, 535 (1879), this Court held that the amount of verdict for damages cannot be disturbed on appeal where there is evidence to sustain it, since this would entail a re-examination of facts. This Court has not changed its position upon this to the present, and this has been specifically held to be the ruling principle in actions under the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq., which was incorporated into the maritime law by the Jones Act, 46 U. S. C. A. 688. In *Lavender v. Kurn*, 327 U. S. 645, 653,

19. In *Morales*, this Court held that since "the lengthy record shows that these findings were based upon substantial evidence. . . . We cannot say that they were clearly erroneous." (U. S. at 168, L. Ed. at 414-15).

90 L. Ed. 916, 923 (1946), this Court said a measure of speculation is appropriate when facts are in dispute and the appellate court's function is exhausted when the evidentiary basis becomes apparent and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.[20]

In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110, 4 L. Ed. 2d 142, 145 (1959), a seaman's Jones Act case, this Court refused to permit the Court of Appeals to reverse the jury's finding of causal connection between trauma and disease, *despite the total absence of medical testimony*, since there was evidence, in the form of testimony by the seaman and circumstantial evidence from which the jury could *infer* causal connection.

The Court below, completely ignoring the *McAllister* principle, conducted a trial *de novo*, to achieve exactly what this Court said shall *not* be done. Every inference and balance of probabilities favoring claimants was reversed as non-existent; every presumption of fact supporting the findings below was passed over. The result was a deprivation to claimants of the most substantial part of the awards made to them.

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20. As this Court there illustrated, the integrity of a verdict under the Federal Employers' Liability Act (and the Jones Act) has been consistently protected, unless there was a complete absence of supporting evidence: *Tiller v. Atlantic C. L. R.*, 318 U. S. 54, 67, 68, 87 L. Ed. 610, 617, 618 (1943); *Tennant v. Peoria & P. U. R. R.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525 (1944); *Rogers v. Missouri Pacific R. R.*, 352 U. S. 500, 1 L. Ed. 2d 515 (1957); *Gallick v. B. & O. R. R.*, 372 U. S. 108, 9 L. Ed. 2d 618 (1963); *Harrison v. Missouri Pac. R. R.*, 372 U. S. 248, 9 L. Ed. 2d 711 (1963); *Dennis v. Denver & Rio Grande W. R. R.*, 375 U. S. 208, 11 L. Ed. 2d 256 (1963). In *Neese v. Southern R. Co.*, 350 U. S. 77, 100 L. Ed. 60, 61 (1955), where the issue was, as here, the contended excessiveness of a damage award, this Court reversed the reversal by the Court of Appeals, per curiam, stating: ". . . as we view the evidence, we thing that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals".

For instance, the Court admitted that the awards for pain and suffering "might be sustained on the basis of their individual testimony describing their personal experiences", but paradoxically disregarded this testimony because, *inter alia,* "we regard the awards for pain and suffering . . . excessive" because not supported by the record (A22). The "inclination to . . . discredit" the psychiatric testimony, expressed by the Court as "strong", led to the conclusion that such testimony was "inadmissible" (A14). The Court expressed disbelief of the psychiatrist because his opinions as to each claimant were "curiously similar" (A14), broadly ignoring the obvious record fact that these men had survived *similar experiences* in exactly the *same disaster.*[21]

The effort by the Court below to minimize the events of May 7, 1965 and to remold the facts found below is most rampant in its discussion of the events between collision and rescue, relative to pain and suffering (A21-22). The Court does not deny the existence of testimony which fully sustains the findings below, but proceeds, nevertheless, to re-evaluate and belittle the extent of the physical suffering involved, to the conclusion that, despite the "individual testimony describing their personal experiences . . . the awards for pain and suffering [were] . . . excessive" (A22). The same technique is used to find excessive the awards for subsequent pain and suffering (A24); and loss of life's pleasures (A24-27). In each instance, the Court

21. Although cured by permitting inference of causal connection (*Sentilles v. Inter-Caribbean Shipping Co.,* 361 U. S. 107 (1959)), the Court below committed similar error in holding the testimony of Dr. Krause, the orthopedist, inadmissible, because "nothing in the record discloses the basis for the doctor's opinion as to causation other than the history related to him. . . ." (A19). That statement ignores the testimony by Holley, Idalski, Piechan, Przybyla and Tulgetske describing their experiences in the collision, being hurled into the icy water, and the events before rescue, which confirm the history given to the doctor.

below, in violation of its duty under *McAllister,* just ignored the facts which it admitted do exist in the record, in order to destroy the findings below.

This infringement upon the Trial Judge's jurisdiction, so in conflict with the mandate of this Court, must be reviewed and reversed.

II. In Completely Deleting All of the Psychiatric Testimony Which Was Accepted by the Trial Judge Because It Was Expert Testimony Based Upon History Given by Claimants to the Physician, the Court Below Seriously Erred, in Conflict With the Decisions of the Second Circuit, in Reid v. Quebec Paper Sales & Transp. Co., 340 F. 2d 34; Seventh Circuit, in Spillers v. Tri-State Glass Lined Storage, Inc., 325 F. 2d 322; and the District of Columbia Circuit, in City-Wide Trucking Corp. v. Ford, 306 F. 2d 805, and Kaufman v. Kaufman, 164 F. 2d 519, Which Hold That an Examining Physician May State the History Given to Him as Basis for His Conclusions.

Completely misled by its own aggressive infringement upon the jurisdiction of the District Court, and to support its effort to reach a different factual and money conclusion, the Court completely struck out all of the psychiatric testimony, by holding that the psychiatrist may not rely on the claimant's history and statement in giving his opinion.[22] This completely unsound conclusion directly conflicts not only with common sense and medical necessity and with the reasoning of experts in the field of evidence, but also with the decisions in other circuits which have held that an

22. The Court below cut out this substantial part of the petitioners' medical testimony because, as stated, it did not believe Dr. Dillon in view of the similarity of his diagnoses, and the fact that the Court would have reached a different result based upon the facts (A14).

examining (although not treating) physician may state patient's history and past complaints in order to show the background which the physician considered in reaching his conclusions. Such testimony is not given to prove the truth of the history but to show the basis for the physician's diagnosis. In a case such as this, where the judge is the fact-finder, the appellate court must assume that he considered the testimony for the proper purpose.

In *Reid v. Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34 (2d Cir. 1965), Judge (now Mr. Justice) Marshall, said, at 38:

> "It was also objected that the District Judge erred in accepting the testimony of a Dr. Kaplan, allegedly Reid's examining but not his treating physician, as to Reid's complaints of past headaches. However, the testimony was not introduced to establish the fact that Reid had experienced these headaches, but rather to show the basis of the doctor's diagnosis. Especially since the judge was the trier of fact, we can presume that this testimony was confined to this non-hearsay purpose. . . ."

In *City-Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (D. C. Cir. 1962), Judge Danaher said that "such information furnishes the basis for the opinion or conclusion arrived at in almost every diagnosis,—certainly in cases where the trouble arises from accident, . . ." (809). In *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (7th Cir. 1963), after fully discussing all views, the Court held that the cases permitting the testifying physician to state the history given to him "embody the better reasoned view" (326). That Court observed that the fact that the history was given to the physician by the plaintiff does *not* affect *competency or admissibility* but goes to its weight, as judged by the fact-finder (327).

The Third Circuit joins the Second, Seventh and District of Columbia Circuits, in opposition to the Sixth, in its Opinion filed several days ago, in Jean A. Fuhrman, Executrix of Estate of Wilbur F. Fuhrman, Deceased v. Reading Co., No. 19,034 (March 11, 1971), a death action under the Federal Employers' Liability Act. The Third Circuit said (Opinion, p. 8):

"Defendant also complains that the medical experts consulted by the plaintiff for purposes of testimony only should not have been permitted to express an opinion based upon a history furnished by the plaintiff. Since the plaintiff himself testified to this very same material during the trial and was available for cross-examination, it is difficult to understand the position of the defense. The plaintiff's history, to which he testified in court was no longer hearsay and the Trial Judge properly ruled that the medical experts could express an opinion based on this factual data."

In *Kaufman v. Kaufman,* 164 F. 2d 519 (D. C. Cir. 1947), the Court specifically recognized that in the case of testimony by an examining psychiatrist, who necessarily must deal solely with the plaintiff's actions, statements and expression of feelings, comprising history and current complaints, these are the sole "objective symptoms" and examination which the psychiatrist can evaluate and describe. Judge Maris said (520):

> ". . . In diagnosing such a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient. Accordingly it was proper for Dr. Klein to base his diagnosis as to the defendant's impotence upon the history and symptoms which the latter related to him and the trial justice should have permitted him to answer the question propounded to him."

Significantly, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States agrees with these Circuits. The preliminary draft of Proposed Rules of Evidence for the United States District Courts and Magistrates provides:

> "Rule 7-03 Opinion Testimony by Experts
>
> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."[23]

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23. The Advisory Committee's Note states that this Rule contemplates the testimony by the expert witness based upon data presented to him outside of court and other than by his own perception. The rule, states the Committee, "is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring

Wigmore on Evidence is also in accord, stating that the "witness may on direct examination state the particular circumstances which legitimately affected his knowledge or recollection, even though the fact would otherwise be inadmissible." The author points out that the judge's instructions must be relied upon to prevent improper use of the testimony. Wigmore, Evidence, Vol. II, Sec. 655, p. 760 (3d ed., 1940).[24] McCormick on Evidence is similarly in accord.[25]

The significance of the Court's removal of the psychiatric testimony from the case is seen in the action it then took against the awards. The Court held as "excessive" or fully improper as matter of law, whatever items may have been "influenced" by Dr. Dillon's testimony (ignoring *in toto* the testimony by the individual claimants[26]): 1. The awards to Mulka and Kierzek for pain and suffering were

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23 (cont'd)

the judicial practice into line with the practice of the experts themselves when not in court." Rule 7-05 dispenses completely with the *duty* to state the underlying facts.

24. Referring to *Lee v. Kansas C. S. Ry.*, 206 Fed. 765 (W. D. Ark. 1913), where testimony by a physician as to symptoms stated to him to qualify as a witness was held inadmissible, Wigmore expressed regret "to see a federal court giving in to this modern heresy, which commits the exploded fallacy of totally prohibiting weak evidence instead of merely ensuring the exhibition of its weaknesses". Wigmore, Evidence, Vol. III, Sec. 688, n. 2 (1970).

25. McCormick states that such history is *necessary* in order that the fact-finder may assess his opinion. McCormick, Handbook of the Law of Evidence (1954), Sec. 267.

26. Even if the psychiatric testimony were incompetent, the Commissioners and the District Judge had before them the claimants' testimony as to their suffering and their post-collision orthopedic, physical and emotional problems. As triers of fact, they had the right to "draw the inference" therefrom that the claimants suffered considerably from this emotional trauma, were unable to enjoy life's pleasures, suffered disability and required medical help. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 109-10, 4 L. Ed. 2d 142, 144-45 (1959). The Court below did comply with this mandate concerning the orthopedic injuries.

vacated completely as based wholly on psychiatric injuries.[27] 2. The Kierzek award for loss of life's pleasures, held based on psychiatric testimony only, was vacated in full.[28] 3. All other awards for pain and suffering and loss of life's pleasures were held grossly excessive, and vacated for re-evaluation.[29] 4. The awards of maintenance and cure to Holley, Idalski, Przybyla and Tulgetske, and all awards for future medical services, were vacated *in toto*.[30] The substantial amounts of the awards thereby affected is obvious.

The conflict between the Sixth Circuit and the Second, Seventh and District of Columbia Circuits, and the support of the latter by two eminent writers on the subject, as well as by the Advisory Committee on Federal Rules of Evidence, require that this Court review the decision below, and express a single Federal rule to be applied uniformly in all admiralty matters throughout the nation. This Court has specifically held that the maritime law must have a *uniform* application throughout the country, unaffected by "local views of common-law rules". This uniformity requirement extends to "the type of proof necessary for judgment". *Garrett v. Moore-McCormack Lines, Inc.*, 317 U. S. 239, 244, 87 L. Ed. 239, 243 (1942).[31] In *Chesapeake & Ohio R. R. v. Kelly*, 241 U. S. 485, 491, 60 L. Ed. 1117, 1123 (1916), this Court said:

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27. A24.

28. A27.

29. A22, 23, 27.

30. A33.

31. Although the instant aspect of the case goes only to measure of damages, it encompasses the entire case, and without the psychiatric evidence the recoveries may be substantially destroyed. Thus, the issue of admissibility of this medical testimony is so important, that it does "significantly affect" the result of the case, and thus, requires the application of a uniform maritime principle of law. *Guaranty Trust Co. of N. Y. v. York*, 326 U. S. 99, 109, 89 L. Ed. 2079, 2086 (1945).

"But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers' liability act it must be settled according to general principles of law as administered in the Federal courts."

III. Future Loss of Earning Capacity Is Not Measured by Comparing Actual Earnings Before the Accident With Earnings Afterward, But by Considering Loss of Earning Power Into the Future and All Relevant Facts Which Affect the Whole Economic Horizon of the Claimant Must Be Considered. In Announcing a Rule for the Sixth Circuit Limiting the Measure of Such Future Loss to a Comparison of the Actual Earnings Before and After the Accident, the Court Below Was in Direct Conflict With the Decisions in the Second Circuit in Alexandervich v. Gallagher Bros. Sand & Gravel Corp., 298 F. 2d 918 (1961) and Sylvestri v. Warner & Swasey Co., 398 F. 2d 598 (1968); the Third Circuit in Wiles v. N. Y., C. & St. L. R. R., 238 F. 2d 328 (1960), Thompson v. Trent Maritime Co., 353 F. 2d 632 (1965) and Johns v. B. & O. R. R., 239 F. 2d 385 (1957); the Fourth Circuit in Lawrence v. Norfolk Dredging Co., 319 F. 2d 805 (1963), and Carter v. United States, 49 F. 2d 221 (1931); and the Eighth Circuit in United States v. Phillips, 44 F. 2d 689 (1930), Which Apply All Relevant Factors to Such Evaluation.

Progressing in its disagreement with the fact-findings and evaluations of the Trial Judge, the Court below summarily disallowed all awards for loss of earning capacity to the date of judgment, and vacated and remanded for re-evaluation the awards for future loss of earnings to all surviving seamen and to the families of the decedents (A27-31, 34, 40-41). Despite a record showing not only past earnings

but, also, an analysis of subsequent collective bargaining agreements showing increases in wage rates, overtime rates, vacation pay, bonuses, and pension and welfare benefits,[32] and testimony as to the rate of increase in wages (R. 21-22), the Court below said that the record was "utterly void of evidence [to] justify an award" (A28). The sole basis for this was that each claimant was paid "on a higher basis" between sinking and judgment than he had received immediately before or for the average of the four years immediately before the sinking.

The Court announced the rule in the Sixth Circuit to be: the base used to measure earnings loss after injury is "the higher of the year immediately preceding the incident or the average of the four years preceding it" (A29). No effect, said the Court, is to be given to any other factor, even if the record be replete with same, as in the instant case. This rule is completely erroneous, since it measures loss of earnings only, not loss of earning *capacity,* and is in specific conflict with the rule applied in other Circuits.

The rule used elsewhere holds that the proper measure is the claimant's earning *capacity;* that the fact-finder may *not* limit his sights to the immediate present, but must consider *the whole economic horizon* of the claimant. This involves not merely a comparison of the amount of dollars in his pay envelope now with what he had before the accident. In *Wiles v. N. Y., C. & St. L. R. R.,* 283 F. 2d 328, 332 (3d

32. These Analysis of Agreements are based upon agreements between United States Steel Corporation and: District 50, United Mine Workers (Kierzak—Deft. Ex. 11, Quaine, R. 51, 55); Associated Maritime Officers, Division of District 2, Marine Engineers Beneficial Association (Kierzek—Deft. Ex. 9, Quaine, R. 51, 54); District 2, Marine Engineers Beneficial Association (Kierzek—Deft. Ex. 12, Quaine, R. 51, 55); United Steelworkers of America—Pension Agreement (Kierzek—Claimants Ex. 7; Gallagher, R. 25); Schedule of Costs to Obtain Pension & Welfare Benefits (Kierzek—Claimants Ex. 8; Idalski, 8/22/68, R. 61); Program of Insurance Benefits (Kierzek—Deft. Ex. 24, Quaine, R. 64).

Cir. 1960), an FELA case, the injured plaintiff received a larger salary after the accident than before. The jury returned a verdict including damages for future loss of earning power. The District Judge set aside the award for future loss as "too speculative".[33] The Third Circuit reversed, holding (332):

> ". . . The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue of damages which the jury was entitled to take into consideration as was the testimony that Wiles, with his present medical history, would have difficulty under the conditions of modern industry in obtaining gainful employment in heavy work except with his present employer. Wiles is presently employed by the Railroad but this will not prevent him from being discharged or from being laid off. Because of his present employment Wiles has not yet suffered economic loss but if he cannot obtain gainful employment elsewhere he is chained to his present job in a kind of economic servitude. We cannot think that it was the intention of Congress in enacting the Federal Employers' Liability Act to effect such a result. *Certainly, Wiles' economic horizons have been limited by his injury* . . . All of the factors enumerated and others were before the jury and we cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' loss of future earnings than there would be in any ordinary instance requiring an estimate of damages by a jury.

33. The District Judge, said, as the Court below did here, that "There is a complete absence of evidentiary facts on which the jury could intelligently assess the monetary difference between what plaintiff would have been able to earn in the future had he not been injured and what he will be able to earn in his physical condition during his work-life expectancy." (332)

> Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation." (Emphasis supplied.)

In *Thompson v. Trent Maritime Co.*, 353 F. 2d 632 (3d Cir. 1965), the Court said, at 635:

> "Even though he earned more as a longshoreman in 1953, the year in which his right foot was injured, than in previous years, it does not follow that he did not sustain a loss of wages in that year if the evidence showed that he could have earned a larger amount had he not been injured. See, for example, Wiles v. N. Y., C. & St. L. R. Co., 283 F. 2d 328, 332 (C. A. 3, 1960), cert. denied, 364 U. S. 900, 81 S. Ct. 232, 5 L. Ed. 2d 193; Taylor v. Monongahela Ry. Co., 155 F. Supp. 601 (W. D. Pa.), aff'd per curiam 256 F. 2d 751 (C. A. 3, 1958)."

Similarly, in *Johns v. Bal. & Ohio R. R.*, 239 F. 2d 385 (3d Cir. 1957),[34] the defendant contended that the plaintiffs were limited to the decedent's earning record shown at time of death, rather than his "potential earning capacity". However, the Trial Judge held that evidence as to probable increased earnings was properly considered by the jury. The Third Circuit Court of Appeals affirmed, per curiam.

The Court of Appeals for the Second Circuit held, in *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.*, 298 F. 2d 918 (1961), after reviewing the injured seaman's expected wage rate, overtime, and fringe benefits, at 921:

> "When the likelihood of substantial overtime pay is considered, and it is noted that as of February 1, 1962, Alexandervich would have been entitled to an

34. Affirming, per curiam, the District Court, 143 F. Supp. 15, 27-28 (W. D. Pa. 1956).

additional $300.00 in wages, and that, *in the light of the history of recurrent wage increases, he would very likely receive additional increases in the following eleven years,* it is apparent that a finding that he would have averaged $10,000.00 per year in the remaining period of his work expectancy is supported by substantial evidence, and is not excessive. In any event, we should not merely substitute our judgment for that of the trial judge." (Emphasis supplied.)

In *Sylvestri v. Warner & Swasey Co.,* 398 F. 2d 598 (2d Cir. 1968), the Court approved placing in evidence the union pay scale in order to evaluate the plaintiff's future loss of earnings. Chief Judge Lumbard said, at 607:

". . . Since it was shown that Sylvestri was trained as, and acting in the capacity of, such an operator at the time of his accident but could no longer perform this type of work, the pay scale is a direct indicator of Sylvestri's potential loss of future earnings *even though he continued to receive a fixed salary* from his own company." (Emphasis supplied.)

The Fourth Circuit Court said, in *Lawrence v. Norfolk Dredging Co.,* 319 F. 2d 805 (1963), a Jones Act case, at 809:

"The fact that Lawrence has earned as much or more since his return to work at the same job following the accident as he had earned prior to the accident is strenuously urged as a circumstance to support the contention that the verdict was excessive. However, a comparison of earnings before and after the injuries is not a particularly significant or controlling consideration where there was evidence before the jury to support the conclusion that, under circumstances such as these, the injuries will adversely affect plain-

tiff's future employment possibilities. See Wiles v. New York, Chicago & St. Louis Railroad Co., 283 F. 2d 328 (3d Cir. 1960), cert. denied, 364 U. S. 900, 81 S. Ct. 232, 5 L. Ed. 2d 193; Faudree v. Iron City Sand & Gravel Co., 201 F. Supp. 447 (W. D. Pa. 1962), aff'd, 315 F. 2d 647 (3d Cir. 1963). . . ."

In *Carter v. United States*, 49 F. 2d 221 (4th Cir. 1931), the same Court held that:

> "The mere fact that a claimant may have worked for substantial periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked, but whether he was able to work, i.e., whether he was able to follow continuously some substantially gainful occupation without material injury to his health. Of course, the fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability; but the fact that he works when physically unable to do so ought not defeat his right to recover if the jury finds that such disability in fact existed. . . ." (223)

In *United States v. Phillips*, 44 F. 2d 689 (8th Cir. 1930), defendant contended that since the claimant did work, he was not disabled, as matter of law. The Eighth Circuit Court strongly disagreed, stating:

> ". . . Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling

deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so. . . ." (691)

The Second, Third, Fourth and Eighth Circuits hold, contrary to the Sixth, that earning capacity means earning *power,* not mere earnings; and that *all* factors relevant to the claimant's economic future must be considered. These courts properly recognize that "standing alone, . . . parity of wages is inconclusive"; that the real fact question is whether "the economic horizon of the disabled person has been shortened because of the injuries", bearing in mind that "the normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages."[35] If "choice of Circuit" is not to control the seaman's measure of damages, in this aspect as well as others, this Court must delineate a Federal rule to complement and give measure to the seaman's right of action under the general maritime law as amended by the Jones Act. Only in this manner can the maritime law "have a uniform application throughout the country". *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 244, 87 L. Ed. 239, 243 (1942).

IV. The Reversal by the Court Below of the Awards to the Widows for Loss of Consortium, Care and Guidance Was Based Upon a Misconception of the Decision of This Court in Michigan Central R. R. v. Vreeland, 227 U. S. 59 (1913), Which Specifically Recognized that Pecuniary Loss Includes Such Damages.

The Court below vacated in full the awards to widows for loss of consortium (A46). This was based upon a mis-

35. The essence of the principle was thus expressed by Chief Judge Leahy in *Yates v. Dann,* 124 F. Supp. 125, 133 (D. Del. 1954).

conception of this Court's reasoning in *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417 (1913). There, this Court considered the measure of damages for death under the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C. A. 51, et seq. (made applicable to seamen by the Merchant Marine (Jones) Act of 1920, 46 U. S. C. A. 688). Mr. Justice Lurton stated that the death provision provides "a liability for the pecuniary damage resulting" (U. S. at 68, L. Ed. at 421), and that such loss "is not dependent upon any legal liability of the injured person to the beneficiary" (U. S. at 70, L. Ed. at 422); and that "a pecuniary loss or damage must be one which can be measured by some standard" (U. S. at 71, L. Ed. at 422). The opinion continues:

> *"Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation."* (U. S. at 71, L. Ed. at 422)
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> * * *
>
> "Neither 'care' nor 'advice,' as used by the court below, can be regarded as synonomous with 'support' and 'maintenance,' for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' " (U. S. at 74, L. Ed. at 423.) (Emphasis supplied.)

In that case, "There was neither allegation nor evidence of such loss of service, care, or advice." (U. S. at 74, L. Ed. at 423). Therefore, the fact-finders had been left "to conjecture and speculation", with no evidentiary basis upon which to decide just what types of loss were involved. In that circumstance, this Court held that there was to be no recovery as to these items (U. S. at 74, L. Ed. at 423).[36]

However, in the instant case, the widows and surviving children testified at length and in detail concerning the decedents' contribution of care, services, counsel, training and consortium (in addition to money support) to each household. It is in view of such facts as these that Mr. Justice Lurton warned, in *Vreeland,* that "no hard and fast rule by which pecuniary damages may in all cases be measured is possible" (U. S. at 72, L. Ed. at 422); and that "the rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent" (U. S. at 72, L. Ed. at 422); and that "each fresh state of facts" must be dealt with as it arises (U. S. at 72, L. Ed. at 422).[37]

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36. But, in *Norfolk & Western Ry. v. Holbrook,* 235 U. S. 625, 629, 59 L. Ed. 392, 393 (1915), an FELA death case, there *was* "testimony concerning the personal qualities of the deceased and the interest which he took in his family." Therefore, this Court, citing *Vreeland,* said that it was proper, then, to take into consideration "the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed". Mr. Justice McReynolds emphasized that "The ascertained circumstances must govern in every case." (U. S. at 629, L. Ed. at 393).

37. See, e.g., *Thomas v. Conemaugh Black Lick R. R.,* 133 F. Supp. 533, 547 (W. D. Pa. 1955); aff'd., 234 F. 2d 429 (3d Cir. 1956) where the testimony showed, as in the instant case, "that the decedent performed other compensatory services in and about the home, such as painting and repairing the premises, plumbing, gardening and many other types of services, which represented over the potential life span of decedent a substantial pecuniary loss."

This case now presents this fresh state of facts. *Here, the losses of service, care, consortium and advice have been alleged and fully delineated,* and the items of which the beneficiaries have been deprived have been described by them in the record.[38]

The Court below urges the proposition that, under *Vreeland,* the claimant is obligated to give specific evidence of the replacement of the services and the dollar value thereof; that the decedents' families must show that these "services" were actually replaced or purchased on the open market by the surviving families, because this Court used the expression "and their replacement value estimated" (A46). But, this would mean that a widow who did not hire someone to give her love and advice, or a child who did not hire a tutor did not suffer the loss. When this Court said that the fact-finder must "estimate the financial value of such care and advice from their own experiences as men", it meant that the fact-finder, or jury, was to place a dollar value on these items themselves, and *not* to seek such dollar values from the mouths of witnesses. This Court left this to the fact-finder to consider, just as it must evaluate pain and suffering. The Sixth Circuit's interpretation completely destroys this Court's reasoning and intent in *Michigan Central v. Vreeland,* and must be reviewed and reversed.

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38. The Fuhrman family unit and relationships: R. 494-501; the Jones family: R. 586-593; the Haske family: R. 19-20, 537-42. The statement by the Court below that "here, there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives" (A46) is clearly denied by the record.

V. In Evaluating Future Damages, the Present Value Doctrine as Expressed by This Court In C. & O. Ry. v. Kelly, 241 U. S. 485 (1916) Requires That Consideration Be Given to the Purchasing Power as Well as to to the Earning Power of Money; Therefore, the Court Below Erred and Was in Conflict With the Ruling of This Court in Ordering That the Awards for Future Losses Made Herein Be Reduced to Present Value, While Failing to Give Effect to Evidence Demonstrating an Inflationary Trend.

The Trial Court, giving effect to the decreasing trend in the purchasing power of the dollar, found that such inflation offset any discount of future damages to present value.[39] The Court of Appeals held this error, and ordered that no effect be given to the declining dollar value, and that the awards be discounted (A50). This was clear error, in conflict with the reasoning of this Court in the leading case of *Chesapeake & Ohio R. R. v. Kelly,* 241 U. S. 485, 491, 60 L. Ed. 1117, 1122 (1916). There, this Court based its announcement of the discounting requirement upon the need "that adequate allowance be made, according to circumstances, for the earning power of money". The essence of this reasoning was that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only" (U. S. at 491, L. Ed. at 1122), since the claimants are expected to put this money to work to earn more money, thus making up the discount. The same basis requires similar consideration for inflation, if such is shown; the former concerns the

39. The District Court determined that a 4 per cent discount would reduce future damages to present value. The "Economic Report of the President to Congress", January 1969, pp. 58-59 (115 Cong. Rec. H351 (H. Doc. No. 91-28)), stated that there would be a 4 per cent increase in the loss of dollar purchasing value. Therefore, the fact-finder determined that the discount and dollar-value loss offset each other (R. 88).

earning power of money, and the latter, its *purchasing* power. Otherwise, the "compensatory" aspect of damages would be mere illusion.

Judge Holtzoff, bearing in mind this Court's monition against forgetting the liberal purpose of death statutes and the misfortune of narrow construction,[40] held that "in determining what constitutes a reasonable amount of damages the shrinking purchasing power of the dollar must be borne in mind." *Hord v. National Homeopathic Hospital,* 102 F. Supp. 792, 793-94, 796 (D. C. 1952), aff'd. 204 F. 2d 397 (D. C. Cir. 1953).[41]

The Court below cited as precedent its prior decision in *Sleeman v. C. & O. Ry.,* 414 F. 2d 305, 307 (6th Cir. 1969) (A50), wherein it denied consideration of the inflationary trend offset, because there was "no evidentiary basis" for it in the record. But, here, the District Court had such basis in the President's Economic Report.[42] The action below, wholly misapplying this Court's holding concerning measure of damages under the maritime law, must be reviewed and reversed.

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40. *Van Beeck v. Sabine Towing Co.,* 300 U. S. 342, 350-51, 81 L. Ed. 685 (1937).

41. Similarly, *Foster v. Donora So. RR,* 144 F. Supp. 297, 298 (W. D. Pa. 1956).

42. See e.g., *Pierce v. N. Y. C. R. Co.,* 304 F. Supp. 44, 45-6 (W. D. Mich., S. D. 1969), where the District Judge took judicial notice of Department of Labor statistics on inflationary trends and thereby offset reduction to present worth.

VI. Admiralty Courts Will Allow Interest From the Date of the Loss in Order to "Make Whole" the Plaintiff. Reversal by the Court Below of Such Award Was In Conflict With the Decisions of the Second Circuit, in Petition of City of N. Y., 332 F. 2d 1006 (1964) and Moore-McCormack Lines, Inc. v. Richardson, 295 F. 2d 583 (1961), Which Apply to Personal Injury and Death Cases the Admiralty Doctrine of Restitutio in Integrum.

The Trial Court awarded pre-judgment interest in the death cases, citing the Second Circuit in *Moore-McCormack Lines, Inc. v. Richardson ("The Mormackite")*, 295 F. 2d 583 (1961).[43] The trial judge here recognized that it thus conflicted with the Sixth Circuit's opinion in *Cleveland Tankers v. Tierney*, 169 F. 2d 522 (1948), but observed that:

> "In the twenty-one years elapsing since the *Cleveland Tankers* decision, however, a generation of men and several generations of law have passed. The benefits of current legal thought and contemporary judicial decisions are before us. They reflect acceptance of prejudgment interest as a legitimate element of damages. We believe this element of damages is valid and respectfully urge the Sixth Circuit Court of Appeals to consider anew the issue in light of contemporary decisions, economic facts and the legal certainty that a debt due on the date of death is payable on the date of death; and a debt due but not paid, bears interest.
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> "Moreover, the discipline of a prejudgment interest payment will pressure, legitimately, the parties involved to proceed with dispatch to final judgment. . . ." (R. 79-80).

43. Confirmed, *Petition of City of New York*, 332 F. 2d 1006 (2d Cir. 1964).

The Court of Appeals, however, merely reversed this award because it conflicted with its 1948 conclusion (A50). This reversal was solely because of the *Cleveland Tankers result,* ignoring the fact that its expressed reason had been the then, 1948, "general practice in admiralty." The current practice, under better reasoning, is to follow the long-established admiralty policy concerning property damage, making no difference between loss of life or limb and loss of property. As Chief Judge Lumbard said, in *Petition of City of New York,* 332 F. 2d 1006 (2d Cir. 1964), at 1007-08:

> ". . . It has long been held proper for admiralty courts fully to restore the injured party to his condition at the time of injury by allowing and fixing prejudgment interests from the date of the loss in proceedings involving property damage. [citing cases] . . . Traditionally, at common law prejudgment interest on an unliquidated tort claim is not allowed. [citing cases] . . . More recently, it has been determined that those who obtain awards resulting from deaths of crew members who died in maritime accident are entitled to prejudgment interest. [citing cases] . . . We said in the Moore-McCormack case that 'when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. . . .'
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> "*The defendant's liability arises at the time of the injury* to the plaintiff and the later award by the court merely fixes the amount of a loss suffered at a *prior* time.
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> • • •

> "The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of prejudgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties." (Emphasis supplied.)[44]

The conflict between the Sixth Circuit and the other Circuits requires that certiorari be granted and the decision below reversed.

CONCLUSION.

The Court below, dissatisfied with the amount of damages found by the Trial Court, has conducted a trial *de novo*, with reconsideration of credibility, reweighing of testimony, and refinding of facts, in complete disregard of *McAllister v. United States*. In this process, the Court below barred evidence and disallowed items of damage, declaring doctrine directly in conflict with the decisions of this Court and other circuits and with admiralty principles. Further, although the Court of Appeals reversed the Trial Judge's decisions as to the rule of admissibility of expert

44. In addition to cases cited hereinabove: *The Natchez*, 78 Fed. 183 (5th Cir. 1896) (Property damage); *The President Madison*, 91 F. 2d 835, 845-47 (9th Cir. 1937) (Property damage); *Geotechnical Corp. v. Pure Oil Co.*, 214 F. 2d 476, 477-78 (5th Cir. 1954) (Property damage); *Moore-McCormack Lines, Inc. v. Amirault*, 202 F. 2d 893, 898 (1st Cir. 1953) (Discusses Admiralty court's discretion to award prejudgment interest, generally); *National Airlines, Inc. v. Stiles*, 268 F. 2d 400, 405 (5th Cir. 1959) (Death on High Seas Act); *Petition of Midwest Towing Co.*, 203 F. Supp. 727, 733 (E. D. Ill. 1962), aff'd., 317 F. 2d 270 (7th Cir. 1963) (Jones Act, death); *Gardner v. National Bulk Carriers, Inc.*, 221 F. Supp. 243, 247-48 (E. D. Va. 1963) (Jones Act, death).

testimony and measure of damages, it remanded for further findings limited to the original record, less the excluded testimony, without permitting claimants to present further evidence pertinent to a determination under the Court of Appeals' views of the law, if said be held correct. This was directly contrary to the principle announced by this Court in *Byrd v. Blue Ridge Rural Electric Company Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953, reh. den., 357 U. S. 933, 2 L. Ed. 2d 1375 (1958). To settle these conflicts and to protect the uniform application of maritime law, this Court should review and reverse the judgment below.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
J. HAROLD TRAVERSE,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioners.

APPENDIX A.

Merchant Marine (Jones) Act, 46 USCA 688.

§ 688. Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located (41 Stat. 1007).

Federal Employers' Liability Act, 45 USCA 51.

§ 51. Liability of Common Carriers by Railroad, in Interstate or Foriegn Commerce, for Injuries to Employees From Negligence; Definition of Employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or,

in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * * * Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Federal Rules of Civil Procedure.

RULE 52.

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

APPENDIX B.

Court's Rulings on Objections and Requests for Modifications to Commissioners' Awards and Opinions Filed May 7, 1969, and Court's Final Orders, Awards, Decrees and Judgments.

(Filed July 8, 1969.)

CONNELL, *J.*

The Court has reviewed in detail the following documents prior to the determination of all the objections filed and modifications requested concerning the Commissioners' Awards and Opinions submitted May 7, 1969.

1. Commissioners' Awards and Opinions, May 7, 1969 (Schroeder/Grogan)

2. Petitioners' objections to Commissioners' Report incorporating petitioners' answer briefs filed with the Commissioners prior to the awards of May 7, 1969 (Keenen/Keig) (filed May 20, 1969)

3. Objections to Commissioners' Report, Awards and Opinions on behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

4. Brief in Support of Objections on Behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Pie-

chan and Stanley P. Mulka (Freedman/Traverse) (filed May 16, 1969)

5. Brief in Opposition to Petitioners' Objections to Commissioners' Report in Behalf of Barbara J. Fuhrman, Administratrix, Marion Jones, Administratrix, Elizabeth Haske, Administratrix, Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

6. Petitioners' Response to Objections to Commissioners' Awards Filed on Behalf of Claimants Fuhrman, Haske, Jones, Holley, Idalski, Kierzek, Mulka, Piechan and Przybyla (Keenen/Keig) (note that Tulgetske omitted) (filed May 28, 1969)

7. Brief in Opposition to Objections of Petitioners to Commissioners' Report incorporating the Lamp brief filed with the Commissioner prior to the award of May 7, 1969 (Hanson/Mann) (filed June 5, 1969)

8. Motion to Modify Commissioners' Award in Claim of Alice Marie Lamp (Hanson/Mann) (filed June 5, 1969)

9. Pettioners' brief in Opposition to Claimant's Motion to Modify Commissioners' Award in claim of Alice Marie Lamp (Keenen/Keig).

COURT'S RULINGS.

The Court overrules all objections by all parties to the Commissioners' Awards and Opinions filed May 7, 1969. The Court further denies all modifications in the awards requested by any one or all of the parties. The Court on May 7, 1969, received and accepted the Commissioners' Awards and Opinions. The Court now this 8th

day of July, 1969, promulgates the Commissioners' Awards and Opinions as the Court's Awards and Opinions and enters, as the final orders, decrees, awards, and judgments for all parties, the awards and opinions of the Commissioners dated May 7, 1969. The facts found and the laws applied by the Commissioners in their awards and opinions are accepted as the findings of fact and rules of law of this Court.

COURT'S OPINION.

All documents presented by the parties reveal the highly controversial factual materials presented in these claims. The Court after careful consideration believes that the findings of all facts by the Commissioners, such as the loss of earning capacity, fringe benefits, personal expenses and decedent's share of household expenses, life expectancy and work-life expectancy, pain and suffering, losses based on familial relationships, physical and mental disabilities, maintenance and cure, interest and discount percentages, economic productivity and purchasing power values and all other facts, are reasonable findings of fact by the Commissioners which this Court accepts and promulgates as its findings of facts.

The Court further recognizes these controversial rules of law involved in these claims:

1. No Deduction of Income or other Taxes.

2. Exclusion of Life Insurance and Social Security benefits from any consideration.

3. Granting of pre-judgment interest and *denial of post-judgment interest.*

4. Exclusion of the fact of remarriage by decedent's widow from any consideration.

5. Admission of certain letters, medical and insurance documents.

6. Admission of psychiatric evidence utilizing the words of claimants spoken to the psychiatrist retained as an expert witness.

The Court accepts and promulgates as its rules of law, not only the enumerated issues above but all controverted issues of law, and the Commissioners' determinations on each rule of law in controversy in each of these claims.

JAMES C. CONNELL,
United States District Judge.

Dated July 8, 1969.

APPENDIX C.

Judgment on Decision by the Court.

(Entered July 8, 1969.)

This action came on for trial before the Court, Honorable James C. Connell, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the claimants recover from the above petitioners the following judgments:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased, the sum of $452,084.00;

Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased, the sum of $194,491.00;

Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased, the sum of $338,095.00;

Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, the sum of $308,702.00;

Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased, the sum of $149,414.00;

Jerome F. Kierzek, the sum of $88,860.00;

Stanley P. Mulka, the sum of $92,740.00;

Raphael Przybyla, the sum of $196,288.00;

Ronald G. Piechan, the sum of $82,160.00;

Billy R. Holley, the sum of $251,976.00;

Michael John Idalski, the sum of $89,420.00;

Walter Tulgetske, the sum of $195,888.00.

It Is Further Ordered that the costs of the case be assessed against the Petitioners.

Dated at Cleveland, Ohio, this 8th day of July, 1969.

James A. Green,
Clerk of Court.

APPENDIX D.

Opinion.

Nos. 19835-36-37-38-39.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

IN THE MATTER OF: THE PETITION OF UNITED STATES STEEL CORPORATION AND PETITION OF DEN NORSKE AMERIKALINJE A/S OWNER OF THE M/S TOPDALSFJORD, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S,

Appellants,

v.

ALICE MARIE LAMP, ADMINISTRATRIX OF THE ESTATE OF DONALD LAMP, DECEASED, ET AL.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided and Filed December 23, 1970.

Before: PHILLIPS, *Chief Judge,* and WEICK and PECK, *Circuit Judges.*

PECK, *Circuit Judge*

There are herein considered appeals perfected by two shipowners from judgments entered against them in favor

of twelve injured parties or personal representatives of decedents and cross appeals by the latter groups protesting the alleged inadequacy of those judgments. Appellants will sometimes herein be referred to jointly as "Shipowners" and separately as "United States Steel" and "Den Norske", respectively, and the injured parties and personal representatives of decedents as "Claimants." Claimants are seven seamen and five widows and administratrices of the estates of seamen who were allegedly injured or who lost their lives when the bulk carrier steamship *Cedarville* sunk in the Straits of Mackinac May 7, 1965. All such decedents and surviving claimants were members of the crew of that vessel.

The sinking of the *Cedarville,* owned by United States Steel, followed its collision with the Norwegian ship *Topdalsfjord,* owned by Den Norske. The collision occurred in a dense fog, and ten members of the *Cedarville* crew were lost and twenty more sustained injuries which resulted in the filing of claims. Five of the death claims and thirteen of the personal injury claims were settled during earlier stages of these proceedings, and we are here concerned with the remaining five claims of the next of kin of the decedents and of seven personal injury claimants. Petitions for exoneration from or limitation of liability were filed in the District Court[1] immediately following the disaster, followed by the filing of claims by the various claimants. Reference is made to the opinion of the District Court (276 F. Supp. 163) for a detailed statement of the facts[2], which will be restated herein only to the extent required for present purposes. Punitive damages were awarded by the District

1. Den Norske's petition was filed in the District Court for the Northern District of Illinois, Eastern Division, but was subsequently transferred to the Northern District of Ohio, Eastern Division, wherein the United States Steel Petition was originally filed.

2. We are aware of Shipowners' dissatisfaction with that statement, and we do not by this reference adopt it.

Court against United States Steel, which perfected an appeal from such award to this Court. We determined the award of punitive damages to have been error in a decision specifically providing that that determination would have no effect upon the awarding of compensatory damages to the various claimants. *United States Steel Corporation v. Barbara J. Fuhrman, Administratrix,* 407 F. 2d 1143 (1969), *cert. denied,* 398 U. S. 958 (1970).

During the pendency of the punitive damages proceedings and appeal, a stipulation was entered into by counsel for all parties and approved by the Court. Under this stipulation the shipowners' petitions for exoneration and limitation of liability were denied and their claims dismissed with prejudice, and it was further provided that, subject to the right of review and appeal, the disposition of all claims for damages, excluding punitive damages, be determined by a commissioner to be appointed by the District Court. It was further stipulated that hearings concerning compensatory damages should proceed during the pendency of the punitive damage determination, which were to be submitted on stipulated portions of the record. As has been hereinabove indicated, the punitive damage issue has heretofore proceeded to finality.

Pursuant to this stipulation, the District Court appointed two Commissioners to receive the evidence with reference to all of the claims, and they in due course filed their Awards and Opinions for the various claimants. The District Court thereafter received and overruled objections and requests for modifications and accepted the facts found and law applied by the Commissioners in their awards and opinions "as the findings of fact and rules of law of this Court." By separate document of even date judgments in favor of the individual claimants for specified sums were entered and costs were assessed against the Shipowners. The amounts of the judgments are as follows:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased	$452,084.00
Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased	194,491.00
Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased	338,095.00
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased	308,702.00
Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased	149,414.00
Jerome F. Kierzek	88,860.00
Stanley P. Mulka	92,740.00
Raphael Przybyla	196,288.00
Ronald G. Piechan	82,160.00
Billy R. Holley	251,976.00
Michael John Idalski	89,420.00
Walter Tulgetske	195,888.00

Before passing to a consideration of the separate items of damages itemized by the Commissioners in their determination of the claimants' awards, attention is directed to the issue presented concerning the scope of the present review. This issue was before us in the appeal dealing with the question of the allowance of punitive damages in the present case and we therein determined that "Rule 52(a) applied to the findings of fact of the District Judge . . . notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein,* 363 U. S. 278, 291; *United States v. United States Gypsum Co.,* 333 U. S. 364, 395." *United States Steel Corp. v. Fuhrman, Administratrix, supra;* see also *Commissioner of Internal Revenue v. Spermacet Whaling & Shipping Co.,* 281 F. 2d 646 (6th Cir. 1960). Thus at the very least, despite the view expressed in the separate concurrence in *Fuhrman* that the determination ex-

pressed therein on this point and in *Spermacet* constituted obiter dictum, the quoted conclusion is here controlling as the law of the case. Accordingly, we are here required to affirm the District Court unless we conclude its finding to have been "clearly erroneous" under the definition provided by the Supreme Court:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum, supra,* at 395.

It is against this yardstick that we measure the evidence of compensatory damages contained in the record.

I. PERSONAL INJURY CLAIMS

For their experiences at the time of the sinking, and for their alleged physical and mental disabilities resulting therefrom, the seven personal injury claimants were awarded a total of $997,332. The individual awards ranged from $82,160 to $251,976, and included the following specific elements of damages: loss of earning capacity from the date of the accident to the date of judgment, and for future loss of earning capacity; pain and suffering experienced during the sinking, from the date of the sinking to the date of judgment, and for future pain and suffering; loss of life's pleasures from the date of the sinking to judgment, as well as future loss of life's pleasures; maintenance and cure to the date of judgment; and the cost of future medical services.

Before turning to a discussion of the specific elements of damages awarded to the personal injury claimants, a few comments of a general nature are deemed appropriate.

The first pertains to the nature of the Commissioners' Opinions and Awards themselves. Those Opinions and Awards, although designated by the Commissioners as their findings of fact and conclusions of law, are entirely unsatisfactory in that respect. Despite the fact that these cases present difficult and complex issues of past and future damages, depending in large part on conflicting medical and psychiatric testimony, the Opinion and Awards for each individual claimant consisted only of a brief review of that testimony together with the claimant's testimony, and concluded with a bare conclusory finding such as:

> "We determine that the claimant Idalski was injured on May 7, 1965 and was damaged thereby."

In each instance a statement of this nature is followed by a listing of the dollar amounts awarded for each of the elements of damages allowed to the individual claimants.

We recognize that this abbreviated aspect of the Commissioners' findings here would not alone be sufficient to require reversal, especially since the findings were concerned with the question of damages rather than liability. Compare *Ginsburg v. Royal Insurance Company,* 179 F. 2d 152, 153 (5th Cir. 1950) with *Matton Oil Transfer Corporation v. The Dynamic,* 123 F. 2d 999, 1000-01 (2d Cir. 1941). But such findings are of little aid to intelligent appellate review. The appellate court is left to presume that the Commissioners accepted the claimants' evidence and based their awards on some combination thereof, but if some of that evidence is found upon review to have been incompetent, the court can only speculate as to the degree to which such evidence influenced the Commissioners.

The next comment is less general in nature, but it pertains to a threshold issue common to each of the personal injury claims. To a very large extent the awards assigned

to the various elements of damages were grounded upon the testimony of claimants' psychiatric and orthopedic experts. With particular reference to claimants' psychiatric expert, shipowners argue that he was a part of a "circle of advocacy" otherwise composed of the claimants and their attorneys, and that his testimony should be discredited as it was by the Commissioner in the *Matter of the Petition of Keystone Tankship Corp. and Keystone Shipping Co.*, In Admiralty, No. 16,994, United States District Court for the Western District of Washington, Northern Division (the *Bunkerhill*). Were we sitting as the triers of fact, or were we not required by the law of the case as established in *United States Steel Corporation v. Fuhrman, Administratrix, supra*, to follow the rule of *Gypsum*, the inclination to so discredit his testimony would be strong upon us. In the existing circumstances, however, we are required to accept that testimony unless we possess "on the entire evidence . . . a definite and firm conviction that a mistake has been committed," or unless we conclude his pertinent testimony was inadmissible in the premises and improperly received in evidence.

Considering the credibility issue first, we find before us a record in which virtually all of the objective evidence is inconsistent with, if not actually diametrically opposed to, the opinions which the psychiatric expert was permitted to place in the record. These opinions are of a curiously similar pattern with reference to each of the personal injury claimants, almost always concluding that each seaman suffered indescribable horrors and has had his future life warped by a "post-traumatic anxiety neurosis"—resulting from a half hour's immersion in the waters over which they traveled for a livelihood. These opinions were based almost exclusively on interviews conducted for the purpose of preparing testimony for presentation to the Commissioners.

In many respects these expert opinions failed to take into account such circumstances as pre-accident complaints and medical treatment for some of the conditions thereafter existing, and in connection with the dire prognostications do not recognize post-accident promotions and actual increases in earnings, nor satisfactory home and occupational adjustments.

An illustrative example is that of claimant Stanley Mulka. Mulka was sailing for the first time on the trip which culminated in the sinking of the *Cedarville*. Prior to sailing he had attended four years of high school and the first year of college at a Roman Catholic seminary, studying for the priesthood. He then had doubts about continued study for the priesthood, and these doubts apparently caused academic problems. He left college on academic probation early in 1965.

After the sinking Mulka abandoned his short-lived sailing career. He worked the remainder of the summer of 1965 as a plumber's helper and returned to college in the fall of 1965. Upon his return to college, he embarked on a course of study to prepare him to be a school teacher. His grades showed a marked improvement after his return to college, almost all A's and B's and he received an excellent rating as a student teacher. At the time of the hearing below Mulka was set to graduate from college, and he was virtually assured of a position as a teacher. In addition to his participation in normal college social life such as fraternities and special interest clubs, he had a steady girl friend and indicated plans of marriage.

Although Mulka testified that he suffered from constant headaches since the date of the accident and that he also suffered constant, sometimes excruciating, pain in his back, arms and hands since the date of the accident, cross-examination disclosed that he had sought medical attention for

headaches prior to the sinking as well as after, but that he had not bothered to seek medical treatment for the "excruciating" pain in his back, arms or hands since the date of the accident.

Claimants' psychiatrist, testifying solely on the basis of the history and symptoms related to him by Mulka, stated that he found Mulka to have deteriorated emotionally and scholastically after the date of the accident. He diagnosed his condition as a "moderately severe anxiety neurosis" which would prevent Mulka from maintaining a job as a school teacher and would disable him to some extent in any occupation he undertook. Cross-examination disclosed to the psychiatrist for the first time many significant facts such as Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher, and the fact that he had sought medical attention for serious headaches prior to the sinking, but the doctor saw no need to change his diagnosis.

Such factors form the basis for our dissatisfaction with this testimony, and applying the test of *Gypsum,* on the basis of the entire evidence, we express a definite and firm conviction that a mistake has been committed. However, we do not reject this testimony on this ground alone.

The rules under which doctors (as well as other experts) are permitted, as an exception to the general rule, to express opinions have been carefully formulated. The most important of those rules for present purposes is that a medical opinion based upon the history and subjective symptoms related to a doctor solely for the purpose of enabling him to testify at trial is inadmissible. *Nashville, C. & St. L. Ry. v. York,* 127 F. 2d 606, 611-12 (6th Cir. 1942); *Hardy-Burlingham Mining Co. v. Baker,* 10 F. 2d 277, 281 (6th Cir. 1926); *Baltimore & O. R. R. v. Mangus,* 294 F. 2d 761, 762 (6th Cir. 1924). *See Padgett v. Southern Ry.,* 396

F. 2d 303, 308 (6th 1968). Shipowners contend that since the remarkably similar diagnoses of each claimant's alleged psychiatric disturbance were based solely on the medical history and subjective symptoms related to the psychiatrist by the claimants in order to qualify him to testify in their behalf, that opinion testimony was inadmissible.

Claimants do not challenge the correctness of this rule as it applies generally to the diagnosis of physical complaints, nor do they challenge the shipowners' assertion that the psychiatric diagnosis common to each claimant was based on the history and subjective complaints related to the doctor to qualify him to testify at trial. Rather, they claim an exemption from the general rule, arguing that the diagnosis of psychic disturbances requires the evaluation of the patient's history and subjective complaints. Indeed, claimants contend that the history, subjective symptoms, attitudes and feelings elicited by the psychiatrist from his patient are the only bases for an evaluation and diagnosis of a psychiatric disturbance.

Whatever persuasive effect this argument might have is vitiated by the fact that it finds no support in the record, and certainly the bases for psychiatric diagnosis cannot be judicially noticed. If it is true that psychiatric evaluation must be based in large extent on subjective evidence, the time may come when a separate rule of law will evolve establishing different admissibility standards for opinions as to mental and physical disorders (or the absence thereof). However, if such a distinction is ever to be made, it must be on the basis of evidence justifying a different standard, which in turn must be established by the testimony of experts. No such testimony is contained in the present record,[3]

3. The only matter in the record remotely touching on this issue are the arguments of counsel at the time the objection to the admission of the psychiatric opinion testimony was made:

"Mr. Keig [Attorney for Den Norske]: Doctor, excuse me. I would like to object to the doctor testifying as to the history

and we will not substitute our lay judgment in this peculiarly nebulous field for evidence.

Even were we to accept the claimants' argument in this regard, it would meet only one of the reasons underlying the general rule outlined above, that of the objectionable hearsay nature of the doctor's narration of his patient's history and subjective complaints upon which his opinion was based. A separate but related policy reason for the rule is the exclusion of medical opinion testimony based on what may well be the self-serving declarations of the plaintiff to the examining doctor. See *Padgett v. Southern Ry., supra.* Where the plaintiff consults a doctor solely to qualify him to testify in his behalf at trial, any statements made to the doctor must be highly suspect as a basis for a diagnosis. This is particularly true where, as here, the complaint is

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he took from this man. The law is clear that examining physicians may not state the history and that their opinion must be based upon evidence otherwise adduced.

"The Commissioner: I think that a history is proper at this time. If he is the treating doctor and saw him on February 25th, 1967, obviously for the purpose of treatment, or as an analyst, or for the purpose of testifying as an expert, I think he can testify as to that.

"Mr. Keig: Mr. Commissioner, that is exactly the point, and you are right. The thing here is he did not see him for treatment, but solely for examination for the purpose of testifying and that forms the foundation for our objection, because the law is clear that in those cases he may not read his history.

"The Commissioner: Mr. Freedman. [Attorney for Claimants]

"Mr. Freedman: I don't offer the history which he obtained from the client as the truth of those statements. I offer them, as you said before—and this is consistent with the law, too. As a matter of fact, the law is universal on this point, that for the purpose of his making a diagnosis and drawing any kind of a conclusion, he needs to have the history, and to that extent it is very relevant."

Whereupon the objection was overruled and the doctor proceeded to testify as outlined above, diagnosing the psychic disturbances of the claimants on the basis of the history and subjective symptoms related to him by the claimants.

entirely subjective, the plaintiff has made no attempt to secure treatment for the complaint, and there is at least some divergence between the history and symptoms related to the doctor and those testified to under oath. Accordingly, we hold the psychiatric opinion testimony to have been improperly admitted in this case.

A somewhat different situation exists with respect to medical opinion testimony of physical impairment. Five of the personal injury claims, Holley, Idalski, Piechan, Przybyla and Tulgetske, offered the testimony of an orthopedic expert, who, like the claimants' psychiatric expert, was consulted by claimants solely for the purpose of enabling him to testify in their behalf at the hearing. At the outset of his testimony shipowners renewed their objection to the admission of any expert opinion testimony based upon the history related to the doctor by the claimant. Without explaining their inconsistent rulings, the Commissioners correctly ruled that the orthopedic expert would not be permitted to testify to the history given him by the claimants. In accordance with this ruling the orthopedist then testified to the symptoms observed by him during the examination of each claimant and stated his diagnosis of their various physical ailments based upon such observations. However, despite the ruling immediately prior thereto, with respect to the question of causation of the physical ailments he had diagnosed, the doctor was permitted to state that in his opinion they were caused by "an incident of May 7, 1965."

The admission of this opinion testimony of causation was error. Nothing in the record discloses the basis for the doctor's opinion as to causation other than the history related to him by the claimants in the course of their examination. As stated above, the opinion of an examining physician based upon the history related to him by the plaintiff is inadmissible. *Nashville, C. & St. L. Ry. v. York, supra; Hardy-Burlingham Mining Co. v. Baker, supra;*

Baltimore & O. R. R. v. Mangus, supra; Padgett v. Southern Ry. supra. However, the admission of this testimony was not fatal to the claimant's claims of physical impairment resulting from the sinking. In *Sentiles v. Inter-Caribbean Shipping Co.*, 361 U. S. 107 (1959), the Supreme Court held that the failure of any medical expert to testify that an accident aboard ship was the cause of a seaman's subsequent tubercular condition did not prevent the trier of the fact from inferring that the accident aboard ship was the cause. 361 U. S. at 109. We believe the erroneous admission of the opinion testimony of causation here creates a record in this case similar to that in *Sentiles:* no competent medical evidence of causation but sufficient evidence from which the Commissioners could infer that the physical disabilities diagnosed were caused by the sinking of the *Cedarville.*

In summary, with respect to the expert opinion testimony offered below in support of the claimants' allegations of physical and psychiatric disabilities, we are presented with a record which contains no competent evidence of psychiatric disturbances or disabilities but which does contain competent evidence of physical disabilities along with other evidence from which the Commissioners could properly infer a causal connection with the sinking of the *Cedarville.* It is with these principles in mind that we turn to a discussion of the individual elements of damages awarded by the Commissioners.

a. Pain and Suffering.

The most constant item in the Commissioners' awards is, as it is described therein, "Pain and suffering for the May 7th event." Four of the claimants were awarded $15,000 each for this item, while two (Idalski and Tulgetske) were allowed $10,000 each and one (Holley) was awarded $20,000.

As has been indicated above, the Commissioners' Opinions and Awards disclose little of the basis for such awards. Under the general caption "Pain and Suffering" they offer one lengthy but inappropriate quotation from American Law Reports but otherwise give no indication of the guidelines used in making their determination. Moreover, while Holley's situation is clearly distinguishable, it is difficult, if not impossible, to ascertain from the Commissioners' description of the experiences of the individual claimants during the sinking just what formed the basis for distinguishing Idalski's and Tulgetske's situation from those of the other four.[4]

The seven personal injury claimants were variously engaged at the moment of the collision of the *Cedarville* and the *Topdalsfjord*. Some were standing their regular watch; some were sleeping and were awakened by the noise and impact of the collision. However, all of the surviving claimants described the impact as relatively "soft," and none were injured by the impact of the collision itself. There then followed a period of time during which, despite the action of the crew members to halt it, the flow of water into the *Cedarville* rapidly increased. It therefore soon became apparent to the crew members that the *Cedarville* was going to sink and that it must be abandoned. In the resulting rush of events most of the crewmen were either thrown or required to jump into the water. They remained there for periods ranging from a few minutes to thirty to forty minutes before being picked up by their rescuers, but while in the water most were able to find their way to a life raft or a life boat within a matter of minutes.

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4. An explanation for this distinction may be found in the fact that, according to the Commissioners' Awards and Opinions, Commissioner Grogan "assumed specific responsibility" for the awards in the Idalski and Tulgetske claims, while Commissioner Schroeder "assumed specific responsibility" for all of the other claims.

A German ship, the *Weissenburg*, had been following the *Topdalsfjord* at a distance of about one mile, and its captain had "seen" the collision on his radar screen. The *Weissenburg* immediately moved into position to pick up the *Cedarville* crew, and, within the thirty to forty minute time period referred to above, all of the survivors had been taken aboard the *Weissenburg*. They were there given blankets, dry clothes and warm drinks. Soon thereafter they were transferred to the Coast Guard Cutter *Mackinac*, aboard which they went to Mackinac City, Michigan, and thence to Cheboygan, Michigan. With but one exception all of the survivors were taken to the Cheboygan Hospital for examination; Mr. Pieehan declined to go to the hospital.

Following examination, none of the claimants were found to require hospitalization, and all were returned to their homes the same afternoon. Claimant Holley, complaining of back pains, returned to the hospital that evening, however. He stayed there one night, underwent further examination, including x-rays, with negative results, and was released by the hospital the following day.

In spite of what can only be regarded as deficiencies in the disclosure of the basis for the Commissioners' Opinions and Awards, the awards to the individual claimants might be sustained on the basis of their individual testimony describing their personal experiences at the time of the sinking except for two factors. First, we regard the awards for pain and suffering on the occasion of the sinking as excessive. Second, we are clearly unable to conclude that the inadmissible but colorful testimony of the highly articulate psychiatric expert was not persuasive with the Commissioners. We thus have no alternative but to vacate these awards and to remand them for reevaluation and further findings on the basis of the present record exclusive of the incompetent psychiatric testimony.

Intervening chronologically between the pain and suffering items "For the May 7th event" and those for the future are the pain and suffering damages allowed for the four-year period from the sinking to the date of the District Court judgment, May 7, 1969. An award in the sum of $10,000 (on the basis of $2,500 per year) was allowed on this account to each of the claimants except for Idalski, who received a $12,000 award (on a $3,000 per year basis).

As in the case of the pain and suffering allowance "For the May 7th event", the Commissioners' Awards and Opinions set forth no satisfactory basis for the determination of these interim period awards (except that again Holley's situation is distinguishable and in Idalski's case, perhaps to justify the higher award made to him, passing mention is made of pains in the left leg, shoulder, shin and elbow area). However, also as in the case of the "For the May 7th event" awards, the fact remains that although there is some evidence in the record as to the claimants' discomfort for a past period, we conclude the amount of the awards to be excessive, and we are unable to say that the inadmissible testimony of the psychiatric expert was not a factor in the determination thereof. Thus these awards must also be vacated and remanded for further findings and reevaluation without such testimony.

The awards for future pain and suffering, which ranged from $5,000 to Mulka (50 years, his life expectancy, at $100 per year) to $35,200 to Tulgetske (10 years at $2,000 per year and 15.2 years at $1,000 per year, for a life expectancy of 25.2 years), present a similar picture. While the basis of the Commissioners' awards for pain and suffering experienced during the events surrounding the sinking and until the date of judgment is less than satisfactory, the direct evidence from the claimants themselves provides some support for the awards. An award of damages for future pain

and suffering cannot rest solely on the evidence of past pain and suffering, however. Competent medical testimony showing both diagnosis and prognosis is necessary before the trier of fact can reasonably find that pain and suffering will continue into the future.

As indicated above, all of the claimants here offered expert psychiatric testimony in support of their alleged future pain and suffering, and all but two of the claimants (Mulka and Kierzek) offered expert orthopedic testimony as additional support. Since we have already held, however, that the expert psychiatric testimony was improperly admitted into evidence and can provide no basis for any of the awards, to the extent that any award was based on such expert psychiatric testimony, it must fail. Accordingly, the awards to Mulka and Kierzek, being based solely on the incompetent psychiatric testimony, must fail completely. The awards to the other five claimants must fail in part also since it is clear that they were based in part on the incompetent psychiatric testimony. However, since, as has also been stated, it is impossible to discern from the Commissioners' Opinions and Awards the extent to which those awards were grounded upon the incompetent evidence, we again refuse to substitute our judgment for that of the Commissioners and instead vacate the awards and remand for further findings and reevaluation solely on the basis of the evidence here held to be competent.

b. Loss of Life's Pleasures.

The next category of awards, those for loss of life's pleasures, is closely related to the awards for pain and suffering in that evidence offered to support a claim for loss of life's pleasures generally parallels that required to support a claim for pain and suffering. Awards in this category have on occasion been made by courts to claimants

who, by reason of their injury, are deprived of the opportunity to participate in the normal activities, social, athletic or recreational, in which a person without such injury could engage. *See e.g., Hanson v. Reiss Steamship Company,* 184 F. Supp. 545 (D. Del. 1960); *Vastano v. Partownership Brovigtank,* 158 F. Supp. 477 (E. D. N. Y. 1957); *Yates v. Dann,* 124 F. Supp 125 (D. Del. 1954).

The Commissioners made awards in this category to each of the personal injury claimants ranging from $3,500 (to Mulka) to $65,200 (to Tulgetske). Here again the awards present the recurrent problem hampering appropriate appellate review in this case — the virtual absence of any indication from the Commissioners of their basis for the awards. To some extent the awards may have been based on the testimony of the claimants as to their inability to engage in certain activities since the date of the accident, but a study of the record precludes any conclusion but that the awards were also based in large part upon the diagnosis offered by claimants' pychiatric expert as to each claimant of a post-traumatic anxiety neurosis.

An illustrative example is that of claimant Jerome Kierzek. The only item in his testimony remotely connected to any impairment of his ability to enjoy the pleasures of life was his own testimony on direct examination that, following the sinking of the *Cedarville,* he acquired a fear of sailing which caused him to engage in heavy drinking. While it is doubtful that such testimony could be considered a proper basis for an award, even that basis is destroyed by his own testimony on cross-examination, which established that his drinking subsided shortly after his marriage a few months after the sinking. The remainder of his testimony provides no support for finding any reduction in any of his activities, social or recreational, or any domestic difficulties which could in any way be related to the sinking.

To the contrary, Kierzek's testimony showed, among other things, that he loved his wife and child, that he got along well with them, that he enjoyed going out socially with his wife (although his opportunity to do so was severely limited during his two years overseas duty in the U. S. Army), and that he had received five promotions during the course of his two year tour of army duty. Moreover, as stated above, Kierzek offered no expert medical opinion testimony of any physical disability caused by the sinking which would impair his ability to engage in the normal activities of a man of his age and situation. The only testimony in the record which even approximates a basis for the Commissioners' award to Kierzek for loss of life's pleasures appears in the incompetent as well as incredible testimony of the claimants' psychiatric expert:

> "Q. Will [this anxiety neurosis] affect his life's pleasures? A. Yes, sir.
>
> "Q. In what respect? A. In that certainly, he cannot have the usual, normal pursuit of happiness that all of us, I believe, are entitled to.
>
> "Mr. Keig: I would like to strike that conclusory statement. There is not one factual thing in that.
>
> "The Commissioner: I was listening for something factual, too.
>
> "Maybe he could give something factual as to how he is going to be denied life's pleasures.
>
> "Q. Will you answer that question, Doctor? A. Yes, sir. I don't believe that he would get the pleasure out of being with people that other people do. I don't believe that he is able to enjoy the pleasures of, say, going to a movie, bowling, organizations that many

men are accustomed to. I believe that he will not be as happy in his marriage as he would be without his anxiety neurosis."

As with the awards for pain and suffering, without the incompetent psychiatric opinion testimony as support, the awards for loss of life's pleasures are so grossly excessive as to be clearly erroneous. To the extent that any of the awards for loss of life's pleasures were based on the psychiatric testimony hereinabove held inadmissible, the awards must fail. A determination, however, of the validity of the awards in this group other than that to Kierzek requires a sifting and weighing of the evidence, a function more suited to the fact finder than to this court. Accordingly, we again vacate and remand for further findings and reevaluation, on the basis of the present record exclusive of the incompetent psychiatric testimony, the awards for loss of life's pleasures to each of the personal injury claimants other than Kierzek. We hold that the award to him *on this account is not supported by the record* as a matter of law.

c. Loss of Earning Capacity.

Two items of damages allowed to each of the personal injury claimants were for loss of earning capacity for the four year period from incident to judgment, and for the future, respectively. The awards made for the four year period may first be summarily disallowed. The Commissioners preface their determination of these awards with the abstruse statement, "The loss of earning capacity of the surviving seamen is measured by reasonable probability based upon evidence which permits the decison-maker to arrive at a pecuniary value of the loss." They then offer a resume of principles suggested as available for guidance

in the determination of such loss, but like the quoted statement, they are without present application because the record is utterly void of evidence which would thereunder justify an award to any of the present claimants. While this further circumstance would not necessarily be fatal to the claims, the fact is that the record establishes that with the exception of Mulka who returned to college shortly after the sinking and Kierzak who entered the Army in March 1966, both of which circumstances were unrelated to the sinking, each of the claimants was compensated on a higher basis during the four year period than that under which he had been receiving compensation either immediately prior to the sinking or for the four-year period immediately prior thereto. The formula for determining the amount of an award for loss of earning capacity in this Circuit was enunciated in *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4, 11 (6th Cir. 1956):

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The meaure of damages in this field is fairly definite, and *the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident.*" (Emphasis supplied.)

The Commissioners, and thus the District Court which adopted their conclusions without independent elaboration, simply ignore this teaching of *Drlik* without reference thereto. Similarly, although the application of *Drlik* is argued in shipowners' main brief, the answering brief of the personal injury claimants (and of three of the death

claimants) makes only a passing comment to another aspect of *Drlik*.[5]

However we express reservations concerning the averaging out period used in *Drlik*. During one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years. For such use as it may be in the remand hereinafter directed, we therefore express the view that the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it, unless the tortfeasor sustains the burden of showing that the single year was high for abnormal reasons. It was for that reason that we earlier observed that these claimants had not shown a decrease in earning capacity for the four year period following the sinking when compared either to earnings immediately prior thereto or to the average of the four pre-

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5. One brief filed in connection with one of the death claims inferentially attempts to discredit *Drlik* by arguing that it adopted the rule from two Second Circuit cases (*Porello v. U. S.*, 153 F. 2d 605 (1946) and *Carroll v. U. S.*, 133 F. 2d 690 (1943)), and then contending that these cases were subsequently overruled by *LeRoy v. Sabena Belgian World Airlines*, 344 F. 2d 266 (2d Cir. 1965). However, *LeRoy* is distinguishable on its facts and is entirely without present application. It is further argued that *Petition of Marina Mercante Nicaraguense, S. A.*, 248 F. Supp. 15 (S. D. N. Y., 1965), modified 364 F. 2d 118 (2d Cir. 1966)). (*The El Salvador*) reaffirmed the Second Circuit's rejection of *Drlik's* "averaging out" theory, but *The El Salvador* used the year prior to death as the base for awards, noting that these earnings were "consistent with . . . previous earning record[s]", and its conclusions are in no way inconsistent with those reached herein. The next year the Second Circuit in *Candiano v. Moore-McCormack Lines Inc.*, 382 F. 2d 961 (2d Cir. 1967), affirming the decision reported at 251 F. Supp. 654 (S. D. N. Y. 1966) approved the establishment of a claimant's earning capacity by averaging his earnings for the six years preceding the accident.

vious years,[6] and we restate the disallowance of those awards.

The problems faced in connection with future earning capacity are considerably more difficult than those involved in a consideration of earning capacity for a concluded period, as in this case the four years from incident to judgment. Where a past period is involved, in the absence of an affirmative showing to the contrary, the best evidence of earning capacity is the individual's actual earning record. As to the future, the same general principle of comparison of the claimant's earning capacity with and without injury applies. As the Second Circuit has stated:

> "The objective is to place the [claimant] in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what [claimant's] annual earning power would have been but for the injury, deducting what it will be thereafter, multiplying the result by [claimant's] [work life] expectancy, and discounting the product to present value." *Conte v. Flota Mercante Del Estado*, 277 F. 2d 664, 669 (2d Cir. 1960).

While the general formula is easily stated, its application, in the evaluation of future earning capacity is less easy. However, again some principles of general application can be stated. The claimant must first establish his normal annual earning capacity, which, in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment, would consist of a projection of claimant's earnings history, taking into account all available data relevant to wage adjustment. Next the claimant

6. In *Drlik*, to determine lost earning capacity this Court used as a base the average of the plaintiff's earnings for the four year period immediately prior to the accident.

must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity. See e.g., *Wiles v. New York, C. & St. L. R. R.*, 283 F. 2d 328, 331 (3rd Cir. 1960); *Conte v. Flota Mercante Del Estado, supra.* We gravely doubt that any such loss can be demonstrated from the record as to any of the present claimants, with the possible exception of Tulgetske and Holley, but once again it is impossible to tell from their Awards and Opinions what factual considerations motivated the Commissioners in this regard, and to what extent the emphatically articulated but inadmissible testimony of the psychiatric expert was persuasive. For this reason the awards made to all of the survivors for loss of future earnings will be vacated and remanded for further findings and reevaluation by the Commissioners.

d. Maintenance and Cure.

Awards for maintenance and cure to the date of judgment were made by the Commissioners to four of the personal injury claimants: Holley, Idalski, Przybyla and Tulgetske. The awards were calculated at the claimants' contractual rate of $8.00 per day for the 1461 days intervening between the date of the sinking and the date of judgment, less any days for which maintenance and cure had already been paid. Thus the award to each claimant was in excess of $11,000.

The principles of law governing an award for maintenance and cure are well settled. The law imposes a duty upon the master and owner of a vessel to provide his seamen with food and lodging if they should become sick or injured while in the ship's service. The duty begins with the inception of the disabling sickness or injury and con-

tinues until the seaman reaches maximum medical recovery. *Vaughan v. Atkinson*, 369 U. S. 527, 531 (1962). Presumably such time would normally be when the seaman voluntarily returns to work. The duty of the shipowner extends beyond the termination of the voyage, *Calmar S. S. Corporation v. Taylor*, 303 U. S. 525, 528 (1938), and it is not necessarily terminated by the seaman's resumption of some gainful employment if the shipowner has in effect forced the seaman to return to work by willfully ignoring his claim for medical attention. *Vaughan v. Atkinson, supra.*

Under the facts of this case we must conclude the awards to have been improper. As with so many of the other awards for the various elements of damage, it is once again difficult, if not impossible, to determine from the Commissioners' Opinions and Awards their basis for granting maintenance and cure. The itemization of the amounts awarded to the four claimants merely contains a cryptic notation such as:

> "He has not reached maximum medical recovery and is entitled to maintenance and cure at $8.00 per day for 1461 days."

The record suggests that, at least insofar as some of the claimants are concerned, the award was based on the testimony of claimants' expert psychiatrist who stated that the claimant was in need of psychiatric treatment from the date of the accident to the date of the hearing. Of course, to the extent any of the awards for maintenance and cure were based on the psychiatric opinion testimony, which we have hereinabove held incompetent, they must fail. The validity of the awards need not rest on whether they were based on the incompetent psychiatric testimony, however, because there is no objective evidence that any of the claim-

ants resumed gainful employment for reasons other than their voluntary determination to do so, nor is there any evidence that any of the claimants made any request for medical attention which was wilfully ignored by United States Steel.

> "A seaman by voluntarily working rather than using maintenance and cure to speed his recovery cannot by those tactics enhance the liability of the shipowner any more than the shipowner can be permitted to minimize his liability by refusing to pay and forcing the seaman back to work." *Pyles v. American Trading and Production Corporation,* 372 F. 2d 611, 619 (5th Cir. 1967).

Accordingly the awards to Holley, Idalski, Przybyla and Tulgetske for maintenance and cure to the date of judgment are vacated.

e. Future Medical Services.

Under the heading "Cost of Medical Services" the Commissioners awarded to each of the seven personal injury claimants amounts ranging from $1,560 (to Kierzek) to $15,600 (to Przybyla and Holley) for the stated purpose of permitting the claimants to receive weekly or bi-weekly psychiatric treatment at the rate of $30 per treatment, for periods ranging from two to five years.[7] Unlike most of the other awards, the basis for the Commissioners' awards for the cost of future medical services is clear. The award to each personal injury claimant was based upon the statement of claimants' psychiatrist that the individual claimant was in need of psychiatric treatment for the period of time

7. The award to Kierzek was an exception to the other awards. His award for future medical services was for the purpose of enabling him to pay weekly visits to a general practitioner rather than seeking psychiatric treatment because of his stated fear of psychiatrists.

for which the award was made. Accordingly, in light of our holding herein that the testimony of claimants' psychiatric expert was incompetent and improperly admitted into evidence, the awards for future medical services, being based upon that testimony, must be vacated.

f. Recapitulation as to Personal Injury Claims.

As had been determined in detail above, certain items included in the judgments entered on account of the personal injuries alleged have been determined to have been erroneously included as a matter of law. Items falling in this category are the losses of earning capacity attributed to each of the seven claimants for the four year period from the date of the sinking to that of judgment, maintenance and cure allowed four claimants (Pryzbyla, Holley, Idalski and Tulgetske) for the four year period, future medical expenses allowed to all seven claimants, loss of future earning capacity allowed to one claimant (Mulka), and for the alleged loss of life's pleasures to one claimant (Kierzek). On the remand hereinafter ordered the District Court is instructed not to allow damages on account of any of these items. On such remand the District Court is further instructed to make further findings and reevaluate every other allowance included in the judgments entered in favor of the various claimants, each of which allowances is specifically disapproved for the reasons hereinabove set forth. Such further findings and reevaluation shall be made on the basis only of the evidence herein held to have been properly received and in accordance with the principles herein enunciated.

II. DEATH CLAIMS.

The death claims present somewhat different issues than those which were presented in connection with the

personal injury claims. With few exceptions there is no dispute about the personal representatives' entitlement to the various elements of damage necessary to compensate them for the "deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622, 625 (6th Cir. 1948). Rather, the principal issues in the death cases turn upon the appropriate method of computation of those elements of damage in order to most accurately reflect the true value of the pecuniary loss to the decedents' families. The exceptions concern the awards against both United States Steel and Den Norske for pain and suffering undergone by the decedents in connection with the circumstances of their deaths and for the loss of care and guidance to the widows, and the award applicable only against Den Norske for loss of consortium and loss of care and guidance to the adult children under the Michigan Wrongful Death Act. These issues will be separately discussed.

a. Loss of Earning Capacity.

The primary element of pecuniary loss to the families of the deceased seamen is, of course, the loss of the decedent's earning capacity, both for the interim period between the date of death and the date of judgment and for the remainder of the decedent's work-life expectancy. The basic factor of the lost earning capacity is the monetary wage which the decedent would have earned had he lived, but earning capacity may also include the value of those fringe benefits which would inure to the benefit of the decedent's family had he lived.

In determining earning capacity loss from the date of death to the date of judgment, the Commissioners first appropriately looked to the decedents' actual earnings

prior to death and selected as a base the highest of each decedent's annual earnings for the five years prior to his death. That base figure was then increased by 4% to 5% per year for each of the four years between the date of death and the date of judgment, such increases representing the Commissioners' views of the annual wage rate increases which the decedents would have received in each of the years from 1965 to 1969. The Commissioners then added to the total of lost earnings so computed a factor ranging from 15% to 40% of such earnings for lost fringe benefits, and from the total of such lost wages and fringe benefits the Commissioners deducted a percentage ranging from 10% to 30%, representing the decedent's personal consumption of such earning capacity.

The Commissioners' computation of future earning capacity loss was similar in many respects to the computation of such loss for the four year period. The earnings base selected by the Commissioners represented an approximation of their prior estimate of each decedent's earnings for the year of judgment, i.e., 1969. That base was then multiplied by the decedent's work-life expectancy, with deductions for the decedent's personal consumption, and to the total thus reached, the fringe benefit factor of 15% to 40% was added. A percentage of 2% to 4% of that total was then added as representing "personal productivity improvement and general economic growth."

Issues are raised here concerning almost every step in the Commissioners' computations of earning capacity loss. Shipowners contend that the earnings base selected by the Commissioners for both the four year period and for the future was too high, that the Commissioners erred in assuming that the decedents would have received a wage rate increase of 4% to 5% for each year during the four year period and that the factors added in for fringe benefits and for "personal productivity and general economic growth"

were excessive. Shipowners also contend that the Commissioners erred in failing to make an adjustment to the awards for earning capacity losses for the value of social security and life insurance benefits payable upon the deaths of the decedents and by failing to make an adjustment for the impact of future income taxes upon such earning capacity. On the other hand, claimants contend that the deductions from the estimated lost earnings for the decedents' personal consumption was grossly excessive and that the Commissioners erred in computing the awards on the basis of work-life expectancy rather than full life expectancy, arguing that the decedents would have worked for the remainder of their full life expectancy.

Turning first to the question of whether the Commissioners erred in refusing to make an adjustment of their determination of earning capacity loss for the impact of social security and insurance benefits, as well as future income taxes, we hold that there was no error in the refusal to make those adjustments.

Social security and insurance benefits payable to the widows and minor children surviving the decedents, even though paid for in part by the decedents' employer, do not represent partial payment of the shipowners' liability for the loss to the families of the decedents' earning capacities. Rather, they represent receipt of private or governmental contract rights which became fully executed and payable upon death without regard to the cause of death, and contrary to shipowners' assertion refusal to allow an "offset" for such benefits does not require them to pay twice for the same loss. *See United States v. Harue Hayashi*, 282 F. 2d 599 (9th Cir. 1960). Shipowners' primary basis for their argument in favor of the adjustment is that the receipt of the social security and insurance benefits reduces the pecuniary loss to the survivors occasioned by reason of the deaths. Relying on the general principle of *Cleveland Tankers, Inc.*

v. Tierney, supra, they contend that they are liable only for the pecuniary loss to the deceased seamen's surviving families. However, upon such reasoning any reduction in the pecuniary loss to the widows or children occasioned, for example, by a widow's remarriage or entry into the labor market, could likewise be justified. As the Commissioners concluded, such benefits are irrelevant to the measure of the earning capacity loss suffered by reason of the seamen's deaths for which the shipowners are liable.

The question of whether an adjustment for the impact of income taxes upon the award for loss of earning capacity should be made presents separate issues. Obviously, the earnings which the decedents would have received in the future had they lived, which is the theoretical basis for the award, would have had federal and other income taxes deducted, and an initially plausible argument can be made that the true reflection of future earning capacity loss must be preceded by an adjustment to the award for such taxes. However, we do not find that argument persuasive because the impact of such future taxes can not be predicted with reasonable certainty. The infinite variations of exemptions and deductions coupled with the possibility of changes in the tax structure which could occur over the span of a decedent's life expectancy could materially alter the impact of the income tax, and any adjustment for income tax either with or without consideration of the possibilities for variation must constitute mere speculation on the part of the trier of fact. *See McWeeney v. New York, N. H. & H. R. R.*, 282 F. 2d 34 (2d Cir.), *cert. denied*, 364 U. S. 870 (1960); *cf. Sleeman v. Chesapeake & Ohio R. R.*, 414 F. 2d 305 (6th Cir. 1969). We therefore adopt the rule that no adjustment for income tax need be made "at the lower or middle reach of the income scale." *McWeeney v. New York, N. H. & H. R. R., supra; Petition of Marina Mercante Nicaraguense, S. A.*, 364 F. 2d 118 (2d Cir.), *cert. denied*, 385 U. S.

1005 (1967) (*The El Salvador*). We further hold that each of the anticipated future individual incomes involved in this case fall within that range and that the Commissioners' refusal to make an adjustment for income taxes did not constitute error.

We turn next to a consideration of the fringe benefits factor by which the Commissioners increased their awards for lost earning capacity by 15 to 40 percent. As in other instances, shipowners do not dispute the propriety of an award for fringe benefits. Rather they dispute the size of the awards and the Commissioners' failure to specify and evaluate each individual benefit included in the total. However, the record shows that both the shipowners and the claimants submitted extensive evaluations of each of the fringe benefits which would have been received by the decedents had they lived. The mere fact that the Commissioners converted the parties' evaluations of the benefits to percentages of the decedents' estimated lost wages for purposes of computation does not render the Commissioners' awards subject to attack for lack of specificity. Insofar as the size of the awards is concerned, the record shows that in some cases there is little variation in the parties' evaluations of the fringe benefit losses, and that in no cases are the Commissioners' awards beyond the range suggested by the parties' own evaluations.[8] While we might not have proceeded in the same manner had the initial decision been

8.

	Claimant's Percentage of Fringe Benefits to Earnings Loss	*Defendants' Percentage of Fringe Benefits to Earnings Loss*	*Commissioners' Percentage of Fringe Benefits to Earnings Loss*
Lamp	22%	19%	20%
Cook	20%	20%	20%
Fuhrman	16%	11%	15%
Haske	22%	10%	15%
Jones	62%	32%	40%

ours, both the percentages and the method of computation chosen by the Commissioners find support in the record, and it cannot be said that they are clearly erroneous.

Lastly we turn to the first element of the Commissioners' computation of earning capacity loss, i.e., the earnings base upon which such computations were made. As stated above, the Commissioners chose as their initial base for computation each decedent's highest annual earnings for the five year period prior to his death. As we have hereinabove indicated in connection with the personal injury claims, however, the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it. We believe the Commissioners' selection of the highest of the decedent's annual earnings for the five years prior to death to have been clearly erroneous. Moreover, after having so selected the initial earnings base, the Commissioners assumed each decedent's gross earnings would have increased by 4% to 5% per year for each year from the year of death to the year of judgment. The only apparent basis for such assumption on the part of the Commissioners was the testimony of expert actuaries and economists which tended generally to show that all wages tend to increase from 5% to 6% annually as the result of increased productivity and inflation. However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived. Those agreements showed that the annual wage increase which the hourly employees would have been entitled to receive in the four years from date of death to the date of judgment approximated 1½% per annum, not the 4% to 5% per annum increase found by the Commissioners. Accordingly we

hold that the earnings bases for the determination of earning capacity loss for both the four year period and for the future found by the Commissioners to have been clearly erroneous. In all other respects we find no error in the Commissioners' method of computation of earning capacity loss. The awards for earning capacity losses for both the four year period and for the future will be vacated and remanded for reevaluation in accordance with the foregoing.

b. Pain and Suffering.

As in the personal injury cases, the most constant item in the Commissioners' awards in the death cases was the award of $5,000 to each claimant for the pain and suffering undergone by each decedent prior to his death. Unlike the pain and suffering awards in the personal injury cases, however, the awards here present relatively uncomplicated issues upon review.

We note first that an award for pain and suffering is a proper element of damages in a Jones Act action for the recovery of the pecuniary loss resulting from the death of a seaman where it can be shown that the decedent experienced such suffering before his death. *St. Louis, I. M. & S. R. Ry. v. Craft,* 237 U. S. 648 (1915); *Cleveland Tankers, Inc. v. Tierney, supra* at 626. Therefore, the issue for our determination is whether there was any evidence from which the Commissioners could reasonably find that the decedents experienced pain and suffering in connection with their deaths.

Shipowners do not dispute the propriety of an award for pain and suffering, but they vigorously contend that no award for pain and suffering was justified in any of the death cases here because there was no evidence of any of the circumstances surrounding the deaths of the crewmen, much less any affirmative evidence that those crewmen experienced pain and suffering at that time. We disagree.

An eyewitness account of the circumstances of the deaths is not essential to such an award. Such evidence does, however, establish that some of the decedents were last observed performing their assigned duties below deck after the collision between the *Cedarville* and the *Topdalsfjord.* During this period of time the *Cedarville* was rapidly taking on water despite the efforts of the crew to halt it, thus permitting the inference that these decedents met their deaths by drowning in those inrushing waters while engaging in an unsuccessful struggle to save the ship. Moreover, it must be remembered that the survivors described the impact of the *Cedarville* and the *Topdalsfjord* as relatively "soft", thus permitting the further inference that it was unlikely that any of the decedents would have been rendered unconscious prior to their final moments. Other decedents were last observed on the deck or in lifeboats but presumably were hurled into the water as the ship capsized and sank. These circumstances, too, give rise to the almost inescapable inference that those crewmen died by drowning, and nothing in those circumstances suggests that they were rendered unaware of their fate. Under such circumstances, an award for pain and suffering cannot be said to be error. *See Grantham v. Quinn Menhaden Fisheries, Inc.,* 344 F. 2d 590 (4th Cir. 1965); *Petition of Marina Mercante Nicaraguense, S. A., supra,* 248 F. Supp. 15, 28 (S. D. N. Y. 1965) (*The El Salvador*); *Meehan v. Central R. R.,* 181 F. Supp. 594, 625-26 (S. D. N. Y. 1960).

Having thus determined that there was sufficient evidence from which the Commissioners could find that the decedents experienced pain and suffering prior to their deaths, our review with respect to this issue is closed. Despite claimants' assertion that the awards of $5,000 were adequate in light of the "excruciating and agonizing suffering that decedents experienced" and shipowners' implicit

argument that the amount was excessive, we will not attempt to substitute our judgment for that of the Commissioners. The awards for pain and suffering in the death cases will not be disturbed.

c. Loss of Consortium and Loss of Counsel and Guidance to the Widows and Loss of Love, Companionship and Guidance to the Adult Emancipated Children.

In the course of their determinations in the death cases, the Commissioners awarded sums to the widows of the deceased seamen for the loss of their husband's counsel and guidance and also for their loss of consortium, and sums to the adult emancipated children for the value of the love, companionship and guidance which those children would have received from their decedent. The propriety of these awards is the basic issue common to all.

As has been noted elsewhere, the jurisdictional basis for the death claims against the defendant United States Steel was the Jones Act, 46 U. S. C. § 688 (and by incorporation, the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq.) because the deceased crewmen were employees of United States Steel. The basis for corresponding claims against defendant Den Norske was the general maritime law as supplemented by the Michigan Wrongful Death Act (M. C. L. A. § 600.2922), because of the absence of any employer-employee relationship between the decedents and Den Norske and the occurrence of the accident within the territorial waters of the State of Michigan. Under those statutes the liability of both defendants is limited to the pecuniary loss occasioned by the death of the family head, and the issue presented with respect to each of the above named items for which the Commissioners made awards is whether those items can properly be considered elements of pecuniary loss arising out of the decedents' deaths.

More specifically, the issue with respect to the awards for loss of counsel and guidance to the widows is whether loss of counsel and guidance is a proper element of pecuniary loss in a Jones Act action for damages by an administratrix of a deceased seaman.

The touchstone for any consideration of the propriety of an award in a Jones Act case for the loss of a decedent's counsel, care and guidance is *Michigan Central R. R. v. Vreeland*, 227 U. S. 59 (1913). In that case, an action under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq., to recover damages for the wrongful death of a railroad employee, the Supreme Court held that the trial court committed prejudicial error in permitting the jury to consider and award damages to the decedent's widow for the loss of the care and advice of her husband. After reiterating the rule that damages in an FELA action, as in a Jones Act action, are limited to the pecuniary loss incurred by reason of the decedent's death, the Court stated in relation to the charge therein that it "threw the door open to the wildest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." 227 U. S. at 73. Since the Supreme Court's decision in *Michigan Central,* no case arising under the Jones Act to which we have been referred by the parties or which has been disclosed by our own research has permitted an award for the loss to the widow of the decedent's care and guidance. *See e.g., Petition of Marina Marcante Nicaraguense, S. A.,* 248 F. Supp. 15 (S. D. N. Y. 1965), *modified* 364 F. 2d 118 (2d Cir. 1966); *Petition of Oscar Tiedemann & Co.,* 236 F. Supp. 895 (D. Del. 1964); *Petition of Petroleum Tankers Corporation,* 204 F. Supp. 727 (S. D. N. Y. 1960); *Petition of Moore-McCormack Lines, Inc.,* 184 F. Supp. 585 (S. D. N. Y. 1960), *modified sub nom., Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (2d Cir. 1961).

Notwithstanding the paucity of authority to support such an award, the claimants and the Commissioners seize upon certain language in *Michigan Central* to justify the awards, as follows:

> "It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice." 227 U. S. at 74.

Claimants contend that here there were allegations and evidence of loss of care and advice and that the awards should therefore be permitted to stand. We disagree. The entire thrust of *Michigan Central* is that the pecuniary loss standard of FELA and Jones Act cases requires specific evidence of both the nature of the services lost and the cost of obtaining such services elsewhere. The Court stated:

> "[T]he word[s] [pecuniary loss] as judicially adopted [are] not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, *and which can only be supplied by the service of another for compensation.*" 227 U. S. at 71. (Emphasis supplied.)

The Court further stated:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from

> the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral and physical training, *such as when obtained from others must be for financial compensation.*" 227 U. S. at 73. (Emphasis supplied.)

We believe these excerpts must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives prior to their deaths which could "only be supplied by the service of another for compensation," much less any showing that any such care or counsel had any pecuniary value. Under such circumstances the award was improper and must be vacated. *Cf. First National Bank of Greenwich v. National Airlines, Inc.*, 288 F. 2d 621 (2d Cir.), cert. denied, 368 U. S. 589 (1961); *Meehan v. Central R. R.*, 181 F. Supp. 594 (S. D. N. Y. 1960).

The precise issue with respect to the Commissioners' awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applied only against defendant Den Norske under the Michigan Wrongful Death Act, is whether the definition of pecuniary loss is to be governed by the principles of the general maritime law or by Michigan law interpreting that state's wrongful death statute. If the principles of general maritime law control, the awards for loss of consortium to the widows were improper because the general maritime law does not recognize that item as an element of pecuniary

loss. *Igneri v. Cie de Transports Oceaniques,* 323 F. 2d 257 (2d Cir.), *cert. denied,* 376 U. S. 949 (1964); *Simpson v. Knut Knutsen, O. A. S.,* 296 F. Supp. 1308 (N. D. Cal. 1969); *Valitutto v. D/S I/D Garonne,* 295 F. Supp. 764 (S. D. N. Y. 1969). But Michigan courts construing that state's wrongful death statute have permitted awards to widows for loss of consortium (e.g., *Montgomery v. Stephan,* 359 Mich. 33, 101 N. W. 2d 227 (1960)).[9]

While the question is one of first impression in this Court, we believe that under recent developments in the law the entire proceedings against Den Norske, including the measure of damages, are governed by the principles of maritime law.

The Commissioners' determination to apply Michigan law to the question of the measure of damages applicable to Den Norske appears to have resulted from their misplaced reliance upon certain language in *Michigan Central v. Vreeland, supra,* but that determination had some basis in light of the then existing state of the law. Prior to its decision in *Moragne v. States Marine Lines,* 398 U. S. 375 (1970), the Supreme Court had uniformly held that there was no liability for wrongful death under the general maritime law, and that absent a statutory right thereto, there could be no recovery by the next of kin of a decedent killed as the result of a maritime tort. Such was the rule of *The Harrisburg,* 119 U. S. 199 (1886), but its venerable teaching was specifically overruled by *Moragne v. States Marine Lines, supra.* Long before the overruling of *The Harrisburg,* the stringency of its rule denying recovery for

9. The awards to the adult emancipated children for loss of love, companionship and guidance need no further discussion as it is now clear that such an award is not an element of pecuniary loss under the Michigan Wrongful Death Act (*Breckon v. Franklin Fuel Co.,* 383 Mich. 251, 174 N. W. 2d 836 (1970), and there is no contention that such an award is a proper element of damage under the general maritime law.

wrongful death in admiralty under the maritime law led to the creation of exceptions to that rule. One of the judicially created exceptions to the stringent rule of *The Harrisburg* was that "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242 (1921).

The development and application of this exception to the general rule denying recovery inevitably led to questions of the appropriate substantive law to be applied where recovery was sought in one jurisdiction under a right created by another jurisdiction. In response, the courts fashioned a test of looking to the origin of the right sought to be enforced, holding that the court was bound to apply the law of the jurisdiction in which the right originated. *See The Tungus v. Skovgaard*, 358 U. S. 588 (1959); *Garrett v. Moore-McCormack*, 317 U. S. 239 (1942); *Curtis v. Garcia F Cie*, 241 F. 2d 30 (3rd Cir. 1957). While it does not appear that the Commissioners engaged in such a reasoning process in making their determination, application of the test set forth above could lead to the result that the measure of damages applicable against Den Norske was to be governed by the Michigan courts' interpretation of the Michigan Wrongful Death Act since, prior to *Moragne v. States Marine Lines*, *supra*, the claimants' right to recovery against Den Norske was rooted in that statute.

The decision of the Supreme Court in *Moragne v. States Marine Lines*, *supra*, which held that an action does lie under the general maritime law for wrongful death caused by a maritime tort, changes that result. Creation of a right of recovery for wrongful death under the maritime law eliminates the need for both the exception to the rule

denying recovery and for the tests designed to implement that exception and permits all facets of that right of recovery, including the measure of damages, to be governed by the principles of the maritime law. We therefore hold the awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applicable only against Den Norske, to have been error. In so holding we recognize that in the proceedings below liability against Den Norske was premised upon the Michigan Wrongful Death Act. However, liability had never been in issue in this case, so the Supreme Court's creation of an additional or alternative basis for Den Norske's liability to the death claimants is of little importance compared to the pervasive issue with respect to all claims, i.e., the appropriate measure of damages. Recognition of a right of recovery for wrongful death under the general maritime law strongly dictates that in order to promote the uniformity and supremacy of the maritime law (*See Kossick v. United Fruit Co.*, 365 U. S. 731 (1961); *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917)), the measure of recovery must be governed by the principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law (*Igneri v. Cie de Transports Oceaniques, supra; Simpson v. Knut Knutsen, O. A. S., supra; Valitutto v. D/S I/D Garonne, supra*) and those recoverable under state law (*Montgomery v. Stephan, supra*). Accordingly, upon the remand hereinafter ordered, the District Court is instructed not to allow damages to any claimants with respect to either loss of consortium to the widows or loss of love, companionship and guidance to the adult emancipated children.

d. The Awards of Prejudgment Interest and the Failure to Discount Future Damage Awards to Present Value.

The two remaining significant issues can be quickly disposed of since they represent instances of the Commis-

sioners' clear disregard of well established law of this Circuit.

In each of the death cases the Commissioners awarded prejudgment interest for the total dollar value of the awards from the date of death to the date of judgment. Such an award of prejudgment interest was error. *Cleveland Tankers, Inc. v. Tierney,* 169 F. 2d 622 (6th Cir. 1948).

The second issue concerns the Commissioners' failure to discount to present value the awards for future damages in all of the cases. The Commissioners' refusal to include in their computation of damages a reduction of future damages to present value was based upon their assumption that inflationary trends resulting in a loss in the purchasing power of the dollar by 4% per annum would offset any reduction to present worth at 4% simple interest. This was error. It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly,* 241 U. S. 485, 491 (1916). It is equally well settled in this Circuit that the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.,* 414 F. 2d 305 (6th Cir. 1969).[10]

Accordingly, in conjunction with the remand hereinabove directed, the District Court is directed to discount to present value all awards for future damages in accordance with generally accepted actuarial principles.[11]

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10. In an attempt to salvage the Commissioners' determination that an offset was justified, claimants contend that the failure to discount to present value would be more than offset by future wage rate increases which they contend the Commissioners ignored. There is no competent evidence in the record to support this contention.

11. We recognize that the determination of the discount rate to be applied to an award for future damages rests within the sound discretion of the District Court. While we have serious reservations about a discount rate at 4% in light of the available return on investments today, we cannot say that the Commissioners' selection of

e. Recapitulation as to Death Claims.

Items in the death claims which we have hereinabove determined were erroneously included in the awards as a matter of law are the awards to the widows for the loss of consortium and for the loss of their decedent's counsel, care and guidance, the awards to the adult, emancipated children for loss of love, companionship and guidance and the award of prejudgment interest on the total value of the awards for the interim period between the date of death and the date of judgment. On remand the District Court is instructed not to allow damages on account of these items. On such remand the District Court is further instructed to reevaluate and recompute the earnings capacity loss of each death claimant in accordance with the principles herein enunciated, specific reference being to the determination of the proper earnings base for the computation of such earning capacity loss. The District Court is further instructed to discount to present value that portion of the award to each death claimant representing future damages in accordance with the principles herein enunciated. (Such instruction also has application to the personal injury claims; the District Court is similarly instructed to discount to present value that portion of the award to each personal injury claimant representing future damages.) In all other respects, no error is found to have intervened in the determination of damages in the death claims.

III. CONCLUSION.

The judgments of the District Court are vacated, and the causes are remanded for further proceedings consistent with the foregoing.

4% was an abuse of discretion. However, as pointed out above, such rate should be compounded in accordance with generally accepted actuarial principles.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19835

IN THE MATTER OF:

PETITION OF
UNITED STATES STEEL CORPORATION
AS OWNER OF THE STEAMSHIP CEDARVILLE.

UNITED STATES STEEL CORPORATION,
Petitioner-Appellant,

v.

ALICE MARIE LAMP, ET AL.,
Claimants-Appellees.

Before: PHILLIPS, *Chief Judge*, WEICK and PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each pa ty to pay his own costs on appeal.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

Filed Dec. 23, 1970.

ISSUED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19837

IN THE MATTER OF:

THE PETITION OF
UNITED STATES STEEL CORPORATION

AND

PETITION OF DEN NORSKE AMERIKALINJE A/S,
OWNER OF THE M/S TOPDALSFJORD,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY.

UNITED STATES STEEL CORPORATION, ET AL.,
Petitioners-Appellees,

v.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR FUHRMAN, DECEASED, ET AL.,
Claimants-Appellants.

Before: PHILLIPS, *Chief Judge*, WEICK and PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each party to pay his own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Filed Dec. 23, 1970.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19839

IN THE MATTER OF:

THE PETITION OF
DEN NORSKE AMERIKALINJE A/S,
OWNER OF THE M/S TOPDALSFJORD,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY.

DEN NORSKE AMERIKALINJE A/S,
Petitioner-Appellant,

v.

ALICE MARIE LAMP, ADMINISTRATRIX OF THE ESTATE OF
FRANK D. LAMP, DECEASED, ET AL.,
Claimants-Appellees.

Before: PHILLIPS, *Chief Judge*, WEICK and
PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each party to pay his own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Filed Dec. 23, 1970.

SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
APR 15 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

No. 1475.

OCTOBER TERM, 1970.

BARBARA J. FUHRMAN,
Administratrix of the Estate of Arthur J. Fuhrman,
Deceased, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE, A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

LUCIAN Y. RAY,
ROMAN T. KEENEN,
Attorneys for Respondent, United States Steel Corporation.

Of Counsel:

McCREARY, RAY & ROBINSON,
1550 Union Commerce Building,
Cleveland, Ohio 44115.

JOSEPH KEIG, JR.,
THOMAS O. MURPHY,
JONATHAN G. BUNGE,
Attorneys for Respondent Den Norske Amerikalinje, A/S.

PRICE, CUSHMAN, KECK & MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603,

JOHNSON, BRANAND & JAEGER,
2700 Terminal Tower,
Cleveland, Ohio 44113.

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In the Supreme Court of the United States

No. 1475.

OCTOBER TERM, 1970.

BARBARA J. FUHRMAN,
Administratrix of the Estate of Arthur J. Fuhrman,
Deceased, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE, A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

COUNTER QUESTIONS PRESENTED.

1. Was the Court of Appeals correct in following the rule of *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), that findings are to be set aside as "clearly erroneous" where, upon the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been committed?

2. Was the Court of Appeals correct in excluding as incompetent expert psychiatric testimony where the expert examined the claimants solely to prepare himself to testify at trial and then testified to and based his opinion wholly upon the history and subjective symptoms related by the claimants, even though the history and subjective symptoms were substantially inconsistent with those related by the claimants on direct examination?

3. Was the Court of Appeals correct in ruling that, in the absence of any other evidence, earning capacity is to be determined by reference to actual earnings?

4. Was the Court of Appeals correct in following the rule of *Michigan Central R.R. v. Vreeland,* 227 U.S. 59 (1913), and every other Federal decision on the subject that no awards are to be made to widows for loss of consortium, care and guidance?

5. Was the Court of Appeals correct in requiring that the District Court discount awards of future damages to present value in accordance with *Chesapeake and Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916)?

6. Was the Court of Appeals correct in holding that an award of prejudgment interest is not required in all maritime personal injury and death cases, but is a matter committed to the discretion of the Court?

COUNTER STATEMENT OF THE CASE.

Respondents strongly object to the Statement of the Case set forth in the Petition of Fuhrman, *et al.*, because it is irrelevant to the issues raised by the Petition, improper in that it refers to "facts" not in the record and insufficient in that it completely ignores those facts in the record which are relevant.

Rule 23(e) of this Court requires that a Petition for a Writ of Certiorari contain "a concise statement of the case containing the facts material to the consideration of the questions presented." Petitioners ignore this requirement. The decision of the Court of Appeals which the Petitioners ask this Court to review was concerned with awards of *compensatory* damages. Instead of stating the evidence introduced on this question of compensatory damages, Petitioners set forth purported "facts" taken from the decision of the District Court concerning punitive damages. One of the two shipowners involved in the awards of compensatory damages was not a party to the punitive damage proceedings. Den Norske Amerikalinje A/S did not participate in these proceedings because all parties had earlier stipulated Den Norske had no liability for punitive damages.

Further, and most importantly, the "facts" related by Petitioners are inaccurate and have already been found inaccurate by the Court of Appeals for the Sixth Circuit. The decision below awarding punitive damages was reversed in *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir., 1969), as "clearly erroneous." The claimants' Petition for a Writ of Certiorari in connection with the punitive damage decision was denied. *Fuhrman v. United States Steel Corp.*, 398 U.S. 958 (1970).

Petitioners prefer to rehash the punitive damage proceedings and engage in personal attacks upon Courts which have no connection with this case, i.e., the United States District Court for the Western District of Washington (Pet., pp 7-8, n. 13*), rather than discuss the facts relevant to the question of compensatory damages because the facts in the compensatory damage record provide no support for the arguments advanced by the Petition.

The instant Petition involves seven personal injury claims and three death claims arising out of the sinking of *The Cedarville* in May of 1965.** Judgments awarding

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* At pages 7 and 8 of the Petition, Petitioners state that the Court of Appeals below "adopted *in toto* the argument of U. S. Steel that Doctor Dillon was incredible because of what a commissioner has said in another case." This is entirely inaccurate. The Court of Appeals noted that Doctor Dillon, the Petitioners' psychiatric expert, has been discredited as "incredible," in *In Matter of the Petition of Keystone Tankship Corp.*, In Admiralty, No. 16,944, W.D. Wash., (1969). However, it expressly refused to proceed on the basis of this determination in those proceedings. The Court of Appeals stated (A14):

> "With particular reference to the claimants' psychiatric expert, shipowners argue that he was part of 'circle of advocacy' otherwise composed of the claimants and their attorneys, and that his testimony should be discredited as it was by the Commissioner in the *Matter of the Petition of Keystone Tankship Corp. and Keystone Shipping Co.*, In Admiralty, No. 16,994, United States District Court for Western District of Washington, Northern Division (the *Bunker Hill*). Were we sitting as the triers of fact, or were we not required by the law of the case as established in *United States Steel Corporation v. Fuhrman, Administratrix, supra* to follow the rule of *Gypsum*, the inclination to so discredit his testimony would be strong upon us. In the existing circumstances, however, we are required to accept that testimony unless we possess 'on the entire evidence . . . a definite and firm conviction that a mistake has been committed,' or unless we conclude his pertinent testimony was inadmissible in the premises and improperly received in evidence."

** Originally, ten death and twenty personal injury claims were filed in the limitation proceedings initiated by the ship-

(Continued on following page)

those claimants compensatory damages which were entered by the District Court in July of 1969 were reversed and remanded by the U. S. Court of Appeals for the Sixth Circuit in December of 1970. *Petition of United States Steel Corp.*, 436 F.2d 1256. Numerous issues were involved. The decision of the Court of Appeals was based upon a complete and thorough review of the record in the compensatory damage proceedings.

An attempt to set forth all facts relevant to this determination by the Court of Appeals would require hundreds of pages. However, a brief summary of the situation in the personal injury claims well illustrates the nature of problem confronting the Court of Appeals.

In the District Court, a total of $997,332 was awarded the seven personal injury claimants in amounts of from $251,976.00 (Holley) to $82,160.00 (Piechan). These awards were made even though the uncontroverted testimony of the claimants themselves and the uncontroverted documentary evidence showed that:

1. Except for the brief period immediately after the sinking when all surviving crew members of the *Cedarville* remained ashore waiting assignment, six of the seven claimants missed no time from work due to any condition which they claimed resulted from the sinking. The single exception, Holley, was absent only 14 days during the summer of 1965 after he was reassigned and lost no time from work thereafter.

2. All claimants had as good or better work records following the sinking as they had prior to May 7, 1965.

(*Continued from preceding page*)

owners below. All but the instant claims and two other death claims were settled on terms described by the District Court as "generous." The two other remaining death claimants have also filed Petitions for a Writ of Certiorari. *Lamp v. U. S. Steel Corp.*, No. 1370 (raising the single issue of prejudgment interest) and *Cook v. U. S. Steel Corp.*, No. 1497.

Five of the claimants returned to sailing for U. S. Steel within a month of the sinking and remained in this employment past the time of trial. Two of these men (Piechan and Holley) occupied the same positions they had held on May 7, 1965, positions which they had held for at least a decade prior to the sinking and from which there was no likelihood of promotion. The other three (Tulgetske, Idalski and Kierzek) had all been promoted between the sinking and the time of trial. The two men (Mulka and Przybyla) who did not return to sailing had not sailed regularly prior to the sinking and, after the sinking, took positions which offered more promise than sailing careers. All seven performed their work in an exemplary manner and without difficulty following the sinking. The earnings of all seven personal injury claimants have increased since the sinking.

3. Five of the claimants sought no medical treatment for the "disabling" conditions they claimed to have resulted from the sinking after they were examined at the insistence of U. S. Steel and treated for minor bruises and abrasions shortly after the sinking. The other two (Piechan and Holley) sought treatment for conditions which they claimed were caused by the sinking although both had sought similar treatment for similar complaints prior to the sinking.

4. The claimants returned to and participated in their community with at least as much effectiveness as before the sinking and their own lives underwent no significant change.

In the entire personal injury record, with respect to all seven claimants, the uncontroverted evidence was that these claimants had sustained:

1. No fractures, amputations, paralysis, burns or other such injuries;

2. No lost or decreased earnings;
3. No lost employment;
4. No failure to work steadily and regularly in their chosen occupation once claimants resumed work after the sinking;
5. No job demotions;
6. In the claims of Kierzek, Mulka, Przybyla, Tulgetske and Idalski, no visits to any doctor for any medical treatment once they had returned to work;
7. No determinations by any United States Public Health Service doctor or other treating physician that the claimants (with a limited exception of Holley) were at any time not fit for duty once they resumed employment after the sinking;
8. In the case of Holley, no determination by any doctor that Holley was at any time not fit for duty after August of 1965;
9. No hospitalization (except Holley who spent the night of the sinking in the hospital);
10. No requests for psychiatric treatment;
11. No operations for injuries causally related to the sinking;
12. No medical expenses;
13. No divorces, marital separations or other family disruptions;
14. No case of alcohol or drug addiction;
15. No complaints to employers, work supervisors, treating doctors or other persons outside claimants' immediate families of emotional ill-being.

Against this background, the Court of Appeals found that the awards below were "clearly erroneous," and reversed and remanded for further proceedings in the District Court.

The three death claims involved in this Petition (Fuhrman, Haske and Jones) presented a similar obvious and irreconcilable disparity between the evidence and the awards made by the District Court.*

Also in several instances the District Court simply refused to follow well-established principles of law even though it recognized its decision was in direct conflict with decisions of this Court and with decisions of the Court of Appeals for the Sixth Circuit. Thus, the District Court took upon itself the prerogative to make an award of pre-judgment interest in the death claims even though it recognized its decision (79):**

> "Squarely contradict[ed] the holding of our superior Sixth Circuit Court of Appeals in *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir., 1948)."

In short, the Court of Appeals was confronted with a situation run amuck. Properly recognizing and exercising its responsibilities under the decisions of this Court, it fully and extensively reviewed the evidence and the applicable law and, after coming to the inescapable conclusion that the findings below were in many respects "clearly erroneous," reversed and remanded for further proceedings in the District Court.

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* Summaries of additional relevant facts in connection with both the personal injury and death claims with references to the appendix in the Court of Appeals are set forth in the Appendix.

** References in parenthesis without the prefix "A" or other indication of separate reference are to the Appendix filed in the Court of Appeals which Petitioners have filed in support of their Petition.

ARGUMENT.

I. A Finding is to Be Set Aside as "Clearly Erroneous" if the Reviewing Court, "Upon the Entire Evidence, is Left with the Definite and Firm Conviction that a Mistake Has Been Committed." The Court of Appeals Had Such a Conviction.

The Court of Appeals was fully aware of the scope of appellate review and the standards to be applied. When the punitive damages phase of this litigation was before that Court, it ruled that the provisions of Rule 52(a) F.R. C.P. were applicable and that the findings of fact should be adopted unless found to be "clearly erroneous." It then found the findings of fact "clearly erroneous." *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir., 1969). This Court denied certiorari. *Fuhrman v. United States Steel Corp.,* 398 U.S. 958 (1970).

In the instant phase of the litigation the Court of Appeals, in again applying that Rule, said (Pet., pp. A11-A12):

> "Before passing to a consideration of the separate items of damage itemized by the Commissioners in their determination of the claimants' awards, attention is directed to the issue presented concerning the scope of the present review. This issue was before us in the appeal dealing with the question of the allowance of punitive damages in the present case, and we therein determined that 'Rule 52(a) applied to the findings of fact of the District Judge * * * notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein,* 363 U.S. 278, 291; *United States v. United States Gypsum Co.,* 333 U.S. 363, 364, 365.' *United States Steel Corp. v. Fuhrman, Administratrix,* [407 F.2d 1143 (6th Cir., 1969)], cert. denied, 398 U.S. 958 (1970); see *Commissioner of Internal Revenue v. Spermacet Whaling & Ship-*

ping Co., 281 F.2d 646 (6th Cir., 1960). Thus at the very least, despite the view expressed in the separate concurrence in *Fuhrman* that the determination expressed therein on this point and in *Spermacet* constituted obiter dictum, the quoted conclusion is here controlling as the law of the case. Accordingly, we are here required to affirm the District Court unless we conclude its findings to have been 'clearly erroneous' under the definition provided by the Supreme Court:

> 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum, supra,* at 395.

It is against this yardstick that we measure the evidence of compensatory damages contained in the record."

This Court has reaffirmed the *Gypsum* test as recently as May of 1969. In *Zenith Corp. v. Hazeltine*, 395 U.S. 100, the Court, speaking through Mr. Justice White, said (p. 123):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948). See also *United States v.*

National Assn. of Real Estate Boards, 339 U.S. 485, 495-496, 70 S. Ct. 711, 717, 94 L. Ed. 1007 (1950); *Commissioner of Internal Revenue v. Duberstein,* 368 U.S. 278, 289-291, 80 S. Ct. 1190, 1198-1199, 4 L. Ed. 2d 1218 (1960)."

If a reviewing court is left with the conviction that a mistake has been committed it not only has the power but the duty to reject the findings of the district court. In *Arnolt Corp. v. Stansen Corp.,* 189 F.2d 5 (7th Cir., 1951) the Court stated at page 9:

> "It is undoubtedly true that a court of review under Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. has the power, even the duty, in a proper case, to overturn the findings of the trial court. * * *"

In support of the above conclusion the Court of Appeals quoted the "clearly erroneous" language in the *Gypsum* case, *supra.* Also see, *Soderhamm Mach. Mfg. Co. v. Martin Bros. Con. & T. Pr. Corp.,* 415 F.2d 1058, 1069 (9th Cir., 1969).

This standard applies even where findings of fact based, in whole or in part, upon oral testimony are being reviewed. *S/S Silberblatt, Inc. v. Seaboard Surety Company,* 417 F.2d 1043 (8th Cir., 1969); *Krause v. Sud-Aviation Societe Nationale De Constructions Aeronautiques,* 413 F.2d 428 (2nd Cir., 1969); *Texas Company v. R. O'Brien & Co., Inc.,* 242 F.2d 526, 529 (1st Cir., 1957).

In their attempt to postulate a conflict between the decision below and the decisions of other courts, including the decision of this Court in *McAllister v. United States,* 348 U.S. 19 (1954), Petitioners neglect to point out that that landmark decision, upon which they so heavily rely, adopted the *Gypsum* definition as the standard to be applied in determining whether a finding is "clearly erroneous." This Court stated (p. 20):

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. [citations omitted] *A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, United States v. Oregon Medical Society,* 343 U.S. 326, 339; *United States v. United States Gypsum Co.,* 333 U.S. 364, 395. * * *" (Emphasis supplied.)

The decisions cited on pages 2 and 3 of the Petition all involved an acceptance of the findings of the triers of fact because, under the *Gypsum* standard, such findings were not established to be "clearly erroneous"; in none of the cases was the appellate court left with a "definite and firm conviction that a mistake had been committed." It is pure sophistry to contend that they are in conflict with the decision below.

It is apparent from an examination of the Opinion below that the rejection by the Court of Appeals of the findings of the District Court was based upon a careful consideration of all of the evidence. Reference need be made to the evidence relating to only one of the claimants, Stanley Mulka, to demonstrate that "a mistake had been committed."

Stanley Mulka was on his first voyage at the time of the sinking of the Cedarville. Prior to his experience as a seaman he had graduated from high school and had studied at a Roman Catholic seminary for the priesthood. He had academic and emotional problems and left the

school on academic probation early in 1965. Following the sinking, he returned to college and prepared to become a school teacher. His grades were almost all A's and B's and he received an excellent rating as a student teacher. He was virtually assured a position as a teacher upon graduation and his social life was normal in every respect, including romantic interests. He sought no medical attention. (For additional facts relating to Mulka, see Pet. pp. A15-A16 and, *infra,* pages A3 to A5.)

In spite of the above uncontradicted facts, Dr. Dillon, claimants' psychiatrist, testified that he found Mulka was suffering from a "moderately severe anxiety neurosis"; that he had deteriorated emotionally and scholastically since the sinking and that this deterioration would prevent him from maintaining a job as a school teacher and disable him, to some extent, in any other occupation he undertook. Dr. Dillon saw no need to change his diagnosis when, on cross-examination, he learned for the first time many significant facts such as Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher and the fact he had sought medical attention for serious headaches and nervousness *prior* to the sinking but not thereafter.

In spite of the complete lack of any objective evidence to support the award and no other medical testimony, the District Court awarded Mulka $92,740.

The same pattern was repeated in case after case. (See summary of facts, *infra,* pages A1 to A19.)

Referring to the psychiatric testimony relating to Mulka and the other claimants, the Court of Appeals stated (Pet. p. A16):

> "Such factors form the basis for our dissatisfaction with this testimony, and applying the test of *Gypsum,* on the basis of the entire evidence, we

express a definite and firm conviction that a mistake has been committed."

The Court of Appeals went on to find that the psychiatric testimony was also inadmissible as a matter of evidentiary law and reversed and remanded for further proceedings.

Counsel for the Petitioners charges the Court below with "indirection" which resulted in "a total and substantial misuse of F.R.C.P. 52(a) and the 'clearly erroneous' rule as implemented and applied by this Court." (Pet., p. 10). If there was ever an instance of a direct and forthright application of the *Gypsum* test, it is to be found here. No appellate court is required, under the provisions of Rule 52(a), to accept findings simply because of the existence of some supporting testimony if, upon consideration of all of the testimony, the finding is unsupportable. There is nothing to the contrary in *McAllister v. United States, supra.*

The Petitioners cite several decisions in alleged support of their contention. We shall consider them, *seriatim.*

In *Grigsby v. Coastal Marine Service,* 412 F.2d 1011 (5th Cir.) (Pet., pp. 12-13), Judge Brown discusses the differing functions of the trial court and the reviewing court. He points out that the reviewing court should be slow to overturn fact decisions of the trial judge. The issue is whether the trial judge fairly weighed the matter and reached a conclusion that seems substantial and reasonable. The soundness of these statements cannot be disputed. They admonish against hasty rejection of findings, but most assuredly do not preclude such rejection and they require that the conclusions reached be "substantial and reasonable." If they are not, then the *Gypsum* test requires that they be vacated. The *Grigsby* case itself

provides support for this proposition since Judge Brown himself, after warning against a hasty rejection of findings vacated the judgment below and remanded on the issue of damages.

In *Carroll v. United States,* 133 F.2d 690 (2d Cir.) (Pet., pp. 13-14), the decision turned on whether an award of $5,000.00 to an injured seaman for pain and suffering was so excessive as to be "clearly erroneous." The court concluded that it was not and declined to interfere with that part of the award. It did, however, also conclude that the continuation of the war bonus for the seaman's working life was unwarranted and "clearly erroneous" and the award for loss of earning power was reduced.

The other decisions cited by Petitioners all involve the review of jury verdicts. Even in this area this Court, contrary to Petitioners' contention (Pet., p. 14), has not held that, unless there is a complete absence of evidence to support a jury's verdict, the appellate court may not interfere.

N.Y.C. & H.R.R. v. Fraloff, 100 U.S. 24 (1879) (Pet., p. 14) involved the refusal of a trial court to set aside a verdict and order a new trial. It is apparent from the opinion of this Court that the trial court found the verdict "was abundantly sustained by the evidence." (p. 31). Had the findings in the case at bar been abundantly sustained by the evidence, they would have been accepted by the Court below.

In *Lavender v. Kurn,* 327 U.S. 645, 653 (1946) (Pet. pp. 14-15), this Court stated that if there is a reasonable basis in the record for a conclusion reached by a jury and it is apparent to the reviewing court that such evidentiary basis exists, the reviewing court's function is exhausted. It follows that it is the obligation of the appellate court to be satisfied that the evidentiary basis does exist and

this necessarily involves an evaluation of the supporting evidence.

In *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 110 (1959), this Court, in addressing itself to the question of the scope of judicial review in jury cases, said that "the focal point is the reasonableness of the particular inference or conclusion drawn by the jury * * *." Contrary to Petitioners' italicized statement that there was a "total absence of medical testimony" (Pet., p. 15), in the *Sentilles* case, two non-treating medical experts testified by way of hypothetical questions and one treating specialist testified, each with varying degrees of certainty, as to the causal connection between the trauma and the disease. The Court therefore ruled that the proofs justified the conclusions of the jury.

Mr. Justice Stewart in a short concurring opinion in the *Sentilles* case was of the firm opinion that the case should not have been reviewed on certiorari. At page 111 he said:

> "Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here. All this has been elaborated *in extenso* by others, and there is no point in repeating or paraphrasing their words. Suffice it to note that I agree with what they have said. See, *e.g., Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 524 (dissenting opinion); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 447 (dissenting opinion)."

Forty-seven years ago Mr. Justice Holmes, speaking for a unanimous Court, said in *United States v. Johnson*, 268 U.S. 220, at page 227:

"We do not grant a certiorari to review evidence and discuss specific facts."

The instant case involves, almost exclusively, the review of the evidence and the discussion of specific facts. The Court of Appeals scrupulously applied the proper standards of review and its decision should not be disturbed.

II. The Court of Appeals Correctly Ruled that the Testimony of Claimants' Psychiatric Expert Witness Was Incompetent Because it Was Based Wholly Upon Histories and Subjective Symptoms Allegedly Related by Claimants During Interviews in Anticipation of Trial and these Histories and Expert Testimony Were Substantially Inconsistent with Claimants' Sworn Testimony.

The Court of Appeals ruled that the testimony of claimants' psychiatric expert witness was incompetent because it was based wholly upon histories and subjective symptoms related to him solely for the purpose of his trial testimony and because such histories and subjective symptoms and the resulting expert opinion were substantially inconsistent with the claimants' own sworn testimony and the other uncontroverted evidence. Petitioners contend that this ruling was error and in conflict with decisions in other Circuits.

Petitioners err on both counts. First, the courts have universally held statements of history and of subjective symptoms to doctors in anticipation of trial and opinions based upon such statements, inadmissible. As stated by the Court of Appeals for the Second Circuit in *Grobelny v. W. T. Cowan,* 151 F.2d 810 (2d Cir., 1945), at page 812:

"The general rule is that self-serving statements are not admissible when made to a doctor who is not

called to treat a party to a lawsuit as a patient but only to examine him to determine his condition without an attempt to treat or cure. * * *"

Similarly, in *Atlantic Coast Line R. Co. v. Dixon*, 207 F.2d 899 (5th Cir., 1953), the Court of Appeals for the Fifth Circuit stated at page 903:

"* * * The rule both in Georgia and generally in the federal courts is that a physician's testimony as to statements of pain and suffering made by a patient to a physician not for the purpose of treatment but to qualify the physician to testify as an expert witness are generally inadmissible."

To the same effect, *Teti v. Firestone Tire and Rubber Co.*, 392 F.2d 294 (6th Cir., 1968), held at page 299 with reference to a non-treating physician:

"Unlike an attending physician, he cannot express an opinion based in whole or in part upon medical history furnished him by the patient."

See also *Globe Solvents Co. v. The California*, 167 F.2d 848, 859 (8th Cir., 1948); *Nashville C. & St. L. Ry. Co. v. York*, 127 F.2d 606 (6th Cir., 1942); *Chicago Railways Co. v. Kramer*, 234 Fed. 245 (7th Cir., 1916) and cases collected in 51 A.L.R.2d 1051, 1065.

The reason for the rule is clear and applies with equal force to any medical expert, including a psychiatrist, who examines a claimant in anticipation of trial. As stated in the *Grobelny* case at page 812:

"The general rule is that self-serving statements are not admissible when made to a doctor who is not called to treat a party to a lawsuit as a patient but only to examine him to determine his condition without an attempt to treat or cure. There is then no incentive to speak truly in order to give the doctor a true basis for diagnosis to enable him to pre-

scribe the proper medical treatment and there may be some inducement to distort facts for the purpose of a trial if one is in the offing."

This does not mean that a claimant is, in all circumstances, unable to get expert medical opinion testimony into evidence. If the testimony is that of a *treating* doctor, rather than an *examining* physician, the rule is equally well established that, since there is a strong motive for the claimant to tell the truth, the history and subjective symptoms related, although hearsay, can be introduced in evidence and opinions can be based upon them. This, of course, has no application to the instant case because the claimants here never sought treatment for the alleged psychiatric injuries sustained as a result of the sinking. As an alternative, facts can be presented to the expert for use in forming his opinion by means of a hypothetical question. See, e.g. *Nashville C. & St. L. Ry. Co. v. York*, 127 F.2d 606, 611 (6th Cir., 1942).

Neither of these alternatives was followed in the proceedings below. Instead, the claimants' psychiatrist was allowed to relate statements allegedly made to him by the claimants which bore no relation to the testimony of the claimants on direct examination [see, e.g., the statement by the Court of Appeals with respect to Mulka that the claimants' psychiatrist was not advised by Mulka of Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher and of the fact that he had sought medical attention for serious headaches *prior* to the sinking (Pet., p. A16)] and to then base an opinion upon such inadmissible testimony.

The dangers inherent in a rule such as that urged by the Petitioners and avoided by the present rule are well illustrated by the facts of these claims where, as a re-

sult of claimants' psychiatrist being able to testify on the basis of the history and subjective symptoms related to him by the claimants, opinions were permitted in evidence which were so inconsistent with the objective facts of the lives of the claimants and the testimony of the claimants themselves as to make findings and awards based upon such testimony "clearly erroneous."

All of Petitioners' citations are consistent with the rule that the testimony of an expert witness must be based on facts otherwise properly in the record. In *Spillers v. Tri-State Glass-Lined Storage, Inc.*, 325 F.2d 322 (7th Cir., 1963) (Pet., p. 18) the expert was present in court when the plaintiff testified from the witness stand and the doctor then based his opinion upon this testimony. The Seventh Circuit expressly noted at page 326 that, unlike the testimony here, the expert's "opinion was not based on unsworn statements made in the absence of any opportunity for cross-examination."

The Seventh Circuit also cited with approval at page 326 the rule applied by the Court of Appeals below, and its own earlier rule in *Chicago Railways Co. v. Kramer, supra,* that such testimony is not permissible where based upon the self-serving, unsupported and unsworn statements of the claimant made out of court.

There is nothing in *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F.2d 34 (2d Cir., 1965) (Pet., p. 18), that suggests any conflict with the Court of Appeals decision here. The incompetency and inadmissibility of the testimony of claimants' psychiatric expert in these claims arose out of substantial discrepancies, variances and inconsistencies between the bases used by the expert for his opinion and the uncontroverted facts brought out by the claimants' own testimony and the uncontroverted documentary evidence. The *Reid* decision does not involve any such issue.

The case of *Fuhrman v. Reading Co.*, _____F.2d_____ (3rd Cir., 1971) (Pet., p. 18A), is similar to the *Reid* case in that it does not address itself to the question in issue here. Apparently, in that case, the plaintiff testified to various facts and these were then presented to the medical expert so that an opinion was given based upon evidence already in the record. This bears no relation to the instant case where no hypothetical question was posed to the expert witness and, further, the subjective symptoms and history related by the claimants on the stand were inconsistent with the information relied upon by the claimants' expert in forming his opinion.

In *City-Wide Trucking Corp. v. Ford,* 306 F.2d 805 (D.C. Cir., 1962) (Pet., p. 18) the question was whether an examining expert might testify to *objective* findings made during the course of an orthopedic examination and base an opinion on these findings; this question has no relevance to the claim of Petitioners here that an examining doctor can testify to and base an opinion upon *subjective* symptoms and a patient's history.

In *Kaufman v. Kaufman,* 164 F.2d 519 (D.C. Cir., 1947) (Pet., p. 19), the physician testifying was apparently the treating physician and statements made to such physicians constitute a common exception to the hearsay rule; again, Petitioners' citation has no relevance.

Petitioners refer to the preliminary draft of the *Proposed Rules of Evidence for the United States District Court and Magistrates* and proposed Rule 7-03. Petitioners' citation of this proposed rule is significant in two regards. First, it should be carefully noted that the proposed Rule 7-03 *will not* change the rule followed by the Court of Appeals below because facts and data not otherwise admissible in evidence on which an opinion or inference may be based can only include those "of a type

reasonably relied upon by experts." Statements of subjective symptoms and history made in anticipation of trial to prepare a doctor to testify are not "reasonably relied upon." The proposed rule is nothing but a codification of the present state of the law.

Petitioners' reference to the *Proposed Rules* also points up the fact that the question which they would have the Court resolve will shortly become moot if the *Proposed Rules* are adopted. Moreover, consideration of this question would not affect the result in the instant cases because the testimony of claimants' psychiatric expert was found not only inadmissible, but was also rejected by the Court of Appeals pursuant to the test of *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) (Pet., pp. A14-A16). In short, consideration of this question would have only limited import.

III. Petitioners Misstate the Ruling of the Court of Appeals on the Question of Loss of Earning Capacity in an Attempt to Create an Illusion of Conflict Between the Circuits Where, in Fact, None Exists.

Petitioners' third argument is based upon a misstatement of the decision of the Court of Appeals on the question of earning capacity. The misstatement is calculated to create an illusion of conflict between the circuits where, in fact, none exists.

Petitioners state that the rule in the Sixth Circuit is that earning loss is to be measured by the "higher of the year immediately preceding the incident or the average of the four years preceding it" (Pet., p. 23). Petitioners then state (Pet., p. 23):

> "No effect, said the Court, is to be given to any other factor, even if the record be replete with the

> same, as in the instant case. This rule is completely erroneous, since it measures loss of earnings only, not loss of earning *capacity,* and is in specific conflict with the rule applied in other Circuits."

In making these remarks, Petitioners do not purport to quote from the opinion of the Court of Appeals. This is because Petitioners' remarks bear no resemblance to what the Court of Appeals actually stated on the question of compensation for loss of earning capacity.

The Court of Appeals stated specifically and clearly that the question to be decided is the amount of "earning capacity," if any, sustained by a claimant as a result of his alleged injury. The Court of Appeals cited its earlier decision in *Imperial Oil Ltd. v. Drlik,* 234 F.2d 4 (6th Cir., 1956) and, specifically, the rule as stated on page 11 of that decision (Pet., p. A28):

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and the amount awarded is controlled by what the evidence shows concerning the *earning capacity* of the injured person before and after the accident." (Emphasis supplied.)

The Court of Appeals then went on to note specifically that the prior earnings record of an individual is not conclusive on the question of the amount to be awarded for lost earnings. The Court stated that (Pet., p. A29):

> "During one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years."

It also recognized the possibility that there might be other (Pet., p. A30):

> "* * * evidence of special circumstances indicating an ability to rise beyond his prior level of employment. * * *"

Accordingly, the Court ruled that the determination of lost earnings was to take into account all available data relevant to wage adjustment (Pet., p. A30).

The Court then continued (Pet., p. A30):

> "Where a past period is involved, *in the absence of an affirmative showing to the contrary,* the best evidence of earning capacity is the individual's actual earning record." (Emphasis supplied.)

Further, the Court stated that where a claimant seeks to claim lost earnings with respect to the future other than those indicated by his actual earning record, he must establish what his earning capacity would have been and then establish the reduction, if any, in his earning capacity resulting from the injury. (Pet., pp. A30-A31).

There is nothing inconsistent in the foregoing with any of the decisions cited by the Petitioners. Petitioners summarize the decisions cited by them at page 28 of their Petition as holding that "earning capacity means earning *power,* not mere earnings; and that *all* factors relevant to the claimant's economic future must be considered." This is precisely the rule of the Sixth Circuit.

Petitioners' difficulty in the Court of Appeals on this question resulted not from the Sixth Circuit adopting a rule contrary to or in conflict with that of the other Circuits, but from the fact there was no evidence of any earning capacity on the part of any of the claimants other than that indicated by their past earnings.

In the case of the personal injury claimants, a comparison of their earnings after the sinking with earnings prior to May 7, 1965 demonstrated there had been no lost earnings at all since the average earnings of all claimants in the years of 1965-1967 were higher than their earnings prior to May 1965.*

Further, the 1965 to 1967 figures represented full employment. In the three years from 1965 to 1967, except for a few days while the claimants awaited reassignment, six of the seven claimants missed no time from work due to any condition which allegedly resulted from the sinking. The single exception, Holley, missed fourteen days of the summer of 1965 and lost no time for sailing thereafter. Since all of these claimants were fully employed in the years from 1965 to 1967, with no time off work, there is no evidence to support any possibly higher earnings than their actual earnings for these and future years.

In the death cases, on the evidence, the conclusion of the Court of Appeals was, if anything, too generous to the claimants. In the year preceding the sinking, 1964, Fuhrman, Jones and Haske each earned less than in preceding years (see page A20). Further, Haske had reached the highest position for which he was qualified and, as found by the District Court, he appeared "by his life and study habits not to have the desire to go any higher on the employment ladder" (103). Jones was a stokerman on May

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*

	Actual Average Gross Earnings (1961-1964)	Actual Average Gross Earnings (1965-1967)
Holley	$ 7,671.50	$ 8,736.08
Adalski	13,651.72	14,422.59
Kierzek	3,403.84	6,741.00 **
Mulka	—	6,100.00 **
Piechan	9,685.22	10,156.01
Przybyla	6,465.85	7,145.49
Tulgetske	18,147.33	20,949.84

** Projected.

7, 1965, the same job he had held for 20 years. In the case of Fuhrman, the District Court stated "the chances of his rising on the employment ladder were limited" (97-98). Nevertheless, the Court of Appeals assumed annual earnings increases for each of these men. Moreover, the earnings award was further indirectly increased by the refusal of the Court of Appeals to take a deduction from earnings for the effect of income and other taxes or for the social security benefits received by the claimants as a result of the deaths of their decedents.

Petitioners refer to a purported "analysis" of collective bargaining agreements as "evidence" to support the awards made by the District Court. This so-called "analysis" was fallacious on its face because of numerous errors in its preparation such as the assumption of a twelve-month sailing season although the sailing season on the Great Lakes is only nine months, inclusion of vacation and holiday pay and sickness and accident benefits even though full employment was otherwise assumed, thus leading to a duplication of recoveries, the assumption that the claimants would have continued to sail for the balance of their life expectancies instead of to age 65, when retirement was mandatory at U. S. Steel, etc.

Petitioners' "analysis" was so erroneous it was rejected by the District Court when it made its awards for loss of earnings capacity (86):

> "Note that we did not use what Claimants emphasized was their annual earning capacity—the work contract rates at which each was entitled to, but which each did not necessarily exercise. Work habits—not contract rights—determine loss of earning capacity."

"Earning capacity" may be distinguished from "earnings" when there is evidence indicating they are in some

way different; however, in this case, there was no such evidence and the Court of Appeals properly looked to the claimants' past earnings records to determine loss of earning capacity, if any.

There is no conflict with other Circuits in this approach since all Circuits accept the principle that awards for lost earnings are not to be plucked from thin air, but are to be supported by the evidence. Thus, in *Thompson v. Trent Maritime Co.*, 353 F.2d 632 (3rd Cir., 1965) cited at page 25 of the Petition, the Court noted at page 635 that an award for loss of earnings might be proper even where a claimant earned more in the year of the injury than in previous years *only if the evidence showed that he could have earned a larger amount had he not been injured.* To the same effect, see *Tullos v. Corley,* 337 F.2d 884 (6th Cir., 1964).

The difficulty of the Petitioners here resulted not from any rule in the Sixth Circuit prohibiting awards of loss of earning capacity based on evidence other than that of past earnings, but the complete absence of any such credible evidence in the record. The decision of the Court of Appeals should not be disturbed.

IV. The Court of Appeals Correctly Applied the Decision of this Court in Michigan Central R.R. v. Vreeland, in Considering Awards for Loss of Consortium, Care and Guidance to Widows.

Contrary to Petitioners' assertions, the Court of Appeals did not misconstrue this Court's decision in *Michigan Central R.R. v. Vreeland,* 227 U.S. 59 (1913), in considering awards to widows for loss of consortium, care and guidance.

In the *Michigan Central* case this Court stated at page 73:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard."

It then went on at pages 72 to 74 to state that a proposed instruction to a jury that it could compensate a widow for the value of the "care and advice" of her husband, if he had lived, "threw the door open to the widest speculation." The Court found that the loss of a husband's care and advice to a widow was "not capable of being measured by any material standard" and held that it was error to allow the possibility of recovery for this item of damages.

Petitioners quote from portions of the *Michigan Central* decision which have no relevance to the proposition they urge. The quotation from the *Michigan Central* decision at pages 29 to 30 of the Petition is not concerned with a possible award for loss of consortium, care and guidance to a widow, but rather with awards for loss of a husband's services, such as carpentry work performed around the house. Awards were made in the District Court for loss of a husband's services and no objection was raised to these on appeal. However, an award to a widow for loss of consortium, care and guidance presents quite a different question.

When those portions of the *Michigan Central* decision which are relevant to the question of awards for loss of consortium, care and guidance are considered, it is apparent that, as stated by the Court of Appeals, this decision (Pet., p. A46):

> "* * * must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives prior to their deaths which could 'only be supplied by the service of another for compensation,' much less any showing that any such care or counsel had any pecuniary value. Under such circumstances the award was improper and must be vacated. Cf. *First National Bank of Greenwich v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir.), cert. denied, 368 U.S. 589 (1961); *Meehan v. Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960)."

This Court's decision in *Michigan Central* has been similarly interpreted and followed by all lower courts in every circuit in disallowing such awards.

As pointed out by the Court of Appeals in its decision and not controverted by Petitioners (Pet., p. A44):

> "Since the Supreme Court's decision in *Michigan Central*, no case arising under the Jones Act to which we have been referred by the parties or which has been disclosed by our own research has permitted an award for the loss to the widow of the decedent's care and guidance. *See e.g., Petition of Marina Marcante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D. N.Y. 1965), *modified* 364 F.2d 118 (2d Cir. 1966); *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895 (D. Del. 1964); *Petition of Petroleum Tankers Corporation*, 204 F. Supp. 727 (S.D. N.Y. 1960); *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (S.D. N.Y. 1960), *modified sub nom., Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961)."

The Court of Appeals further noted, without contradiction by Petitioners, that the general maritime law

does not recognize awards for loss of consortium to widows as an element of pecuniary loss (Pet., pp. A46-47), citing in support *Igneri v. Cie de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963) cert. den. 376 U.S. 949 (1964).

The Court of Appeals for the Second Circuit in *Igneri,* in an exhaustive analysis of the common law and maritime law pertaining to loss of consortium, stated under the reasoning of the *Michigan Central* case at page 266:

> "And it is established also that the damages recovered by a seaman's widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium."

That same Court held in *Middleton v. Luckenbach S.S. Co.,* 70 F.2d 326 (2d Cir., 1934) that under the Death on the High Seas Act, 46 U.S.C. § 761, the widow cannot recover damages for loss of her husband's society and companionship.

See also *Valitutto v. D/S I/D Garonne,* 295 F. Supp. 764 (S.D.N.Y., 1969) and *Simpson v. Knut Knudsen, O.A.S.,* 296 F. Supp. 1308 (N.D. Cal., 1969) where those Courts similarly held awards for loss of consortium were not allowable under the general maritime law.

The Court of Appeals correctly applied the principles of this Court established in *Michigan Central* and uniformly followed in all subsequent cases that under the general maritime law and the Jones Act no awards are recognized for loss of consortium, care and guidance to widows.

V. The Court of Appeals Correctly Ruled that Awards for Future Losses Are to be Discounted to Present Value in Accordance with This Court's Decision in Chesapeake & Ohio Ry. v. Kelly.

After torturing *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913) beyond recognition in their search for a plausible basis for their Petition, Petitioners next turn their attention to the equally longstanding and time honored decision of *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916). In that case, this Court held that awards of future losses are to be discounted to present value, stating at page 490:

> "* * * [A]s a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in making up the award."

Petitioners take this clear and straightforward proposition and attempt to twist it to support just the opposite conclusion, that future losses should *not* be discounted to present value. They then argue that the decision of the Court of Appeals, which followed the clear meaning of the *Kelly* case, is in conflict with that decision.

There is no conflict. The Court of Appeals decision that the awards of future damages are to be discounted to present value is consistent with the *Kelly* case and every other decision of record to the present time.

What Petitioners really object to is the holding of the Court of Appeals that the District Court committed error in refusing to discount future damages to present value in accordance with the *Kelly* case because of an alleged prospective future "loss of dollar purchasing power" due to inflation.

The District Court, on the one hand, found that the awards of future damages were to be discounted to present value on the basis of the earning power of money in non-inflationary times (i.e., a rate of 4% per annum).

No consideration was given to the effect of inflation upon the earning power of money even though, at the time this case was pending before the District Court, the prime lending rate was 8½% and the yield on AAA corporate bonds of companies such as Consolidated Edison was in the neighborhood of 8½% to 9½%.

Then, having ignored the possible effects of inflation upon the *earning power* of the dollar, the District Court in effect took judicial notice that there would be inflation at a rate of 4% per annum indefinitely into the future, found that this would result in a loss of dollar *purchasing power* at 4% per annum and concluded that the earning power of the dollar (which had been established without consideration of the effects of inflation) would be completely offset by a loss of dollar purchasing power due to inflation.

Because of this contradictory approach, because the question of the purchasing power of money is inextricably interwined with other complex and speculative economic phenomena which must also be considered, once the question of inflation is introduced, and because of the inherently speculative nature of an inquiry into the possible effects of future inflation, i.e., the earning and purchasing power of a dollar at any given future period of time might either increase or decrease, the Court of Appeals followed its rule in *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir., 1969), that the present value adjustment called for by the *Kelly* case is to be made without any offset for any assumed inflationary or deflationary trend,

either upon the earning or the purchasing power of the dollar.

In the *Sleeman* case, the Court stated at page 308 that it did not

> "encourage the trial courts of this circuit to explore such speculative influence on future damages as inflation and deflation."

and continued:

> "[T]he inflation v. deflation debate rages inconclusively at the highest policy levels of our government, in national or electoral campaigns, learned economic journals and is exemplified in the daily gyrations of the stockmarkets. Debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is open to similarly speculative and debatable off-sets tending in their directions."

The Court of Appeals for the Second Circuit in *McWeeney v. New York, N. H. & H. R.R. Co.*, 282 F.2d 34 (1960), in discussing the effect of inflation, stated at page 38:

> "* * * there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25.11 (1956)."

Similarly, in *Armentrout v. Virginian Ry. Co.*, 72 F. Supp. 997 (D.C. S.D. W. Va., 1947), cited with approval in the *McWeeney* case, the Court stated (at page 1001):

> "It is possible, of course, that values may cease to be affected by inflation of the currency. Economic conditions may conceivably cause the value of the dollar again to rise to the point where it stood before the World War II. On the other hand, there is no assur-

> ance that its value may not become less as time goes on. This possibility balances, if it does not outweigh, the contrary forecast. It would be, I think, mere speculation to adopt either theory as the foundation of an estimate of future earnings."

The Court of Appeals adopted the same reasoning it applied to the issue of inflation in considering the question of whether a deduction should have been taken from assumed future earnings for future income taxes. The court held that no adjustment for the impact of income taxes upon an award for loss of earning capacity was to be made

> "* * * because the impact of such future taxes can not be predicted with reasonable certainty * * *" and any adjustment "* * * must constitute mere speculation on the part of the trier of fact." [Pet., p. A38.]

Petitioners claim that there is evidence in the record below on inflationary trends and point to the District Court's reference to the *Economic Report of the President to the Congress,* January 1969. Petitioners claim the District Court took "judicial notice" of this document. Petitioners' point, of course, ignores the fact that the Court of Appeals reversed the District Court not only for lack of evidence, but also because of the District Court's inherently contradictory approach to the question of the effect to be given inflation and its refusal to follow the *Sleeman* case. However, Petitioners also misrepresent the state of the evidence when they suggest there was evidence in the record on the effects of inflation.

The *Economic Report of the President* was *not* judicially noted and was never made a part of the record or evidence of the proceedings below, but was merely referred to by the District Court in its opinion. Further,

facts regarding inflation, including the precise rate of future inflation, are not a proper subject for judicial notice. As the Court stated in *Alvary v. United States,* 302 F.2d 790 (2d Cir., 1962), at page 794:

> "On fact questions the Court should not use the doctrine of judicial notice to go outside the record unless the facts are of matters of common knowledge or are capable of certain verification. See, e.g., *Brown v. Piper,* 91 U.S. 37, 42, 23 L. ed. 200, 1875; *McCormack on Evidence,* Chapter 37 (1954)."

The nature of inflation and its effects upon the economy in the future, and on the earning and purchasing power of money, are most certainly not "matters of common knowledge * * * capable of certain verification."

There was no justification for the District Court ignoring the effect of inflation upon the earning power of money and then off-setting the discount called for by the *Kelly* case by reason of the alleged effect of inflation upon the purchasing power of the dollar, either as a matter of law or upon the evidence. The Court of Appeals was correct in reversing the District Court and remanding the case with the direction that the District Court is to discount the awards for future damages to present value in accordance with generally accepted actuarial principles and the *Kelly* case.

VI. The Decision of the Court of Appeals that an Award of Prejudgment Interest Would Amount to an Abuse of Discretion Is Consistent With the Decisions of the Court of Appeals for the Second Circuit.

Petitioners' final argument is that certiorari should be granted because the decision of the Court of Appeals on the question of prejudgment interest is in conflict with the rule of the Court of Appeals for the Second Circuit.

Petitioners misstate the rule of the Second Circuit as reflected in cases such as *Petition of City of New York*, 332 F.2d 1006 (2d Cir., 1964), cert. den. sub. nom. *City of New York v. Bernstein*, 279 U.S. 922 (1964), and *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2nd Cir., 1961), cert. den. 368 U.S. 989 and 370 U.S. 937 (1962). Petitioners construe these decisions as requiring mandatory awards of prejudgment interest in admiralty in all cases. This is incorrect.

The rule in all circuits is that of *The Scotland*, 118 U.S. 507 (1886) where this Court stated at pages 518 to 519:

> "The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has had to pass upon the subject, whether it be a court or a jury."

The Second Circuit has followed *The Scotland*. In the *Richardson* case, the Court of Appeals for the Second Circuit stated at page 593:

> "Under admiralty practice, the District Court has a measure of discretion in allowing and fixing moratory interest."

In the *Richardson* case there was no award of prejudgment interest to the personal injury claimants (p. 592, n. 5) and the Court noted that the admiralty courts do not go so far as New York state courts and give prejudgment interest in death claims from the date of death as a matter of right, but have discretion to refuse awards of prejudgment interest (p. 594, n. 14a).

See also *The Wright*, 109 F.2d 699 (2d Cir., 1940), where the Court stated at page 702:

"It is stated repeatedly that the award of interest in admiralty is a matter of the Court's discretion."

There is nothing in *Petition of the City of New York* inconsistent with these cases and, in fact, both are cited with apparent approval at page 1008 of the *City of New York* case.

Further, in two recent cases subsequent to all of these decisions, *LaCapria v. Compagnie Maritime Belge,* 286 F. Supp. 980 (S.D.N.Y., 1968), aff'd. 427 F.2d 244 (2d Cir., 1970) and *Candiano v. Moore-McCormack Lines, Inc.,* 251 F. Supp. 654 (S.D.N.Y., 1966), aff'd. 382 F.2d 961 (2d Cir., 1967), cert. den. 390 U.S. 1027 (1968), the District Courts denied awards of prejudgment interest to the plaintiff longshoremen as a matter of discretion and these decisions were affirmed by the Court of Appeals for the Second Circuit.

The Court of Appeals for the Sixth Circuit follows the rule that the question of prejudgment interest is a matter for the discretion of the Court. See *Reiss Steamship Company v. United States Steel Corporation,* 427 F.2d 1152 (6th Cir., 1970) at pages 1153 to 1154 and *Monsanto Chemical Co. v. No. 3 Bull Towing Company,* 326 F.2d 18 (6th Cir., 1963). It also correctly decided that, in this case, where discovery on issue of compensatory damages was delayed at the instance of the claimants, where most of the claims were settled on terms described by the District Court as "generous" long prior to judgment, and where the District Court itself specifically found that the shipowners proceeded expeditiously and did not need the discipline of a prejudgment interest penalty, any award of prejudgment interest would amount to an abuse of discretion. *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir., 1948).

There is no conflict here with the Court of Appeals for the Second Circuit. Both circuits follow the rule of this Court in *The Scotland*.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LUCIAN Y. RAY,
ROMAN T. KEENEN,
Attorneys for Respondent United States Steel Corporation.

Of Counsel:

McCREARY, RAY & ROBINSON.

JOSEPH KEIG, JR.,
THOMAS O. MURPHY,
JONATHAN G. BUNGE,
Attorneys for Respondent Den Norske Amerikalinje, A/S.

PRICE, CUSHMAN, KECK & MAHIN,
JOHNSON, BRANAND & JAEGER.

APPENDIX.

STATEMENT OF FACTS.

I. PERSONAL INJURY CLAIMS.

(a) Claim of Jerome Kierzek (Award: $88,860).

On May 7, 1965, Jerome Kierzek was 20 years old and unmarried (842). Like all other claimants, he was a resident of Rogers City, Michigan. He began sailing for U. S. Steel upon graduation from high school in 1963 (842) and was serving as a Porter when the *Cedarville* sank (843).

The *Cedarville* capsized about 10:25 a.m. on May 7, 1965. As the ship rolled to starboard, Kierzek went into the water and swam a few feet to a nearby life boat (845). Within one-half hour of the sinking, Kierzek and the other survivors were taken aboard the German vessel *Weissenburg* and shortly thereafter transferred to the Coast Guard cutter *Mackinac* (846-847). He and the others went ashore at Mackinac City in the early afternoon and were taken to Cheboygan Hospital to be examined by doctors (847-848). Kierzek made no complaints at the hospital (859), and the results of the physical examination were completely negative except for a "contusion" or bruise on his left chest (Kierzek Cl. Ex. 6). Kierzek returned to his home in Rogers City that same afternoon.

Kierzek remained at home awaiting reassignment to another U. S. Steel vessel and returned to sailing on May 23, 1965 as soon as an opening was available (849-850). In the autumn of 1965, he was promoted to Second Cook, being advanced over another Porter with greater seniority (855, 866). In September of 1965, Kierzek married and subsequently he and his wife had a child (842).

In March of 1966, Kierzek was drafted into the United States Army (843). He passed his pre-induction and induction physical and mental examinations without difficulty (854). During his two years in the Army, he advanced to the rank of Specialist Fifth Class, a promotion of five levels over a two-year period (854). He served in Viet Nam and won three medals for his service there; he also earned a sharpshooter's medal (854). While in the Army, he served as a First Cook (843), supervising two or three men at all times (862). Kierzek made friends in the Army (854) and, at the time he testified in Cleveland, stated that he was happy with his work and that he had no difficulty in performing his duties (862). The Court below found he had performed his two year Army duty "in exemplary manner" (120).

Following his honorable discharge from the Army in March of 1968, Kierzek returned to work as a Second Cook aboard a U.S. Steel laker vessel (868). In reapplying for employment, Kierzek underwent a complete physical examination which was completely negative and completed a questionnaire in which he denied the existence of any illnesses, operations or injuries which required the care of a physician (Kierzek Def. Ex. 8, 909-911).

On May 7, 1965, Kierzek was earning approximately $492 a month (Kierzek Ex. 4); three years later, in March of 1968 as a Second Cook, he was earning $749 a month (Kierzek Def. Ex. 5A).

Kierzek has not missed one day from work, either while in the employ of U.S. Steel or in the Army, since his return to sailing following the sinking due to any condition allegedly relating to the sinking of the *Cedarville* (863-866).

Kierzek has never, at any time, seen a doctor or sought medical assistance for any condition claimed to be

connected with the sinking (853), even though medical assistance has been available at all times at no cost either through the United States Public Health Service or through the Army.

The District Court found that Kierzek has a "normal and happy" family life (120) and that he has had "modest success in his endeavors" to "carry on a normal life pattern" since the sinking (121). It was also found that Kierzek suffered "physical and mental injuries" with resulting permanent disabilities (121-122). The nature and extent of these injuries and disabilities were not specified.

The District Court awarded Jerome Kierzek $88,-860.00. Of this amount, $43,000 was awarded for loss of earning capacity; $15,000 for pain and suffering experienced during the incident of May 7, 1965; $29,300 for residual pain and suffering and loss of life's pleasures and $1,560 was awarded for cost of future medical expenses (122).

(b) Claim of Stanley Mulka (Award: $92,740).

At the time of the sinking of the *Cedarville*, Stanley Mulka was 20 years old, single and a resident of Rogers City, Michigan (913). He had studied for the Roman Catholic priesthood and had gone to a seminary high school and Aquinas College until February of 1965 (913-914). In college, his grades were generally C's and D's and he had been placed on scholastic probation (943). In early 1965, prior to the sinking, Mulka sought treatment on several occasions from a doctor in Grand Rapids, Michigan, for constant headaches which were severe enough to cause him to consider leaving school. He was also seen by the school doctor for complaints of nervousness (Mulka Def. Ex. 4; 123).

Mulka interrupted college in February of 1965. He stayed home for several weeks and then, on April 25, 1965, sailed for the first time in his life as a Deckhand aboard the *Cedarville*. Mulka sailed for 13 days, to May 7, 1965, when the *Cedarville* sank (914).

Mulka's experiences during and immediately after the sinking were similar to those of Kierzek. He made no complaints to the examining physician except for some minor bruises, aches and pains, and he was released to return home on the afternoon of May 7, 1965 (917).

Three days after the sinking, Mulka went to work for his uncle at a plumbing company in Rogers City (920). He returned to college at the first available opportunity, entering Michigan State University in the summer of 1965 as a guest student because he could not be admitted as a full-time student due to his poor scholastic record. Mulka returned to Aquinas College in the fall of 1965 and finally in the spring of 1966, entered Central Michigan University. At Central Michigan, in contrast to the C's and D's he received prior to the sinking, his grades were A's and B's with a single C (Mulka Def. Ex. 3). On vacations, he continued to work as a plumber (950).

In contrast to his prior monastic life as a seminarian, at Central Michigan, he moved into a small apartment with classmates with whom he got along well (947). He eventually joined a fraternity (948). He was active in extracurricular activities, becoming Vice-President of the Psychology Club (948). He met a girl whom he intended to marry upon graduation from college (962).

At the time of the hearings below, Mulka was well along the road toward becoming a full-time high school teacher. He had participated in the intern teaching program at Central Michigan and had been told that he would make an excellent teacher as a result of evaluations con-

ducted by the school board at Saginaw, Michigan (961). He had been offered a permanent position in the Saginaw school system with a starting salary of $6,100 for nine months of work (948, 964, 966). There were also fringe benefits, including a pension plan, in connection with this position (966). This contrasted with the $492 a month or $4,428 he could have earned during the nine month sailing season if he had remained employed as a Deckhand.

Mulka's complaints in the hearings below were of "nervousness" (941) and constant "excruciating headaches" (939), as well as vague pains in the fingers, neck and low back. Mulka had a history of nervousness and headaches prior to the sinking which had caused him to seek medical treatment (123). However, as found by the District Court (124):

> "He has sought no medical treatment since May 7, 1965."

Moreover, at the time he applied for admission to Central Michigan University in the fall of 1965, Mulka completed a questionnaire in which he specifically denied any history of nervousness or headaches (Mulka Def. Ex. No. 9, 1005-1007). Similarly, in his application for a teaching internship, Mulka described his health as "excellent" (945).

The District Court found Mulka had emotional problems before the sinking and that this "condition was aggravated" by that experience. No further findings describing the nature or extent of aggravation were made (125).

The District Court awarded Stanley Mulka $92,740. Of this amount $53,000 was awarded for loss of earning capacity, $15,000 for pain and suffering experienced during the sinking, $18,500 for residual pain and suffering and loss of life's pleasures and $6,240 for the cost of future medical treatment (125-126).

(c) Claim of Raphael Przybyla (Award: $196,288).

On May 7, 1965, Raphael Przybyla was 37 years old, married, the father of four minor children and a resident of Rogers City, Michigan. Despite his age, Przybyla had been sailing for only six months, having started sailing at the age of 36 in June of 1964. For the preceding eighteen years, except for a two-year tour of duty with the Army, he had worked for his father at his father's automobile agency in Rogers City (1236-1237).

Przybyla's experiences during the sinking were similar to the other claimants. He complained of soreness and bruises at the hospital, was examined and discharged, returning home about 5:00 p.m. on the day of the sinking (1240-1241).

Shortly after the sinking, Przybyla returned to work for his father who asked him to come back to work at the auto agency and, as an inducement, offered him an increase in salary (1263, 1267). Upon returning to work for his father, Przybyla worked his way up until, at the time of the hearings below, he was Manager of Parts and Service at the automobile agency. In addition, Przybyla's father semi-retired on January 1, 1968, leaving actual control of the business to his son (1290).

Przybyla's earnings from 1963 to 1967 were as follows (Przybyla Ex. 2A-D, 5):

Year		*Earnings*
1963		$6,450.39
1964		$6,481.31
1965	*(Sinking)*	$7,099.60
1966		$6,600.00
1967		$7,736.88

Przybyla testified he works regularly nine hours a day, six days a week at the auto agency (1243). In addition, although he is scheduled to work only one night a week, he normally works several nights a week (1243).

Przybyla is also active in a variety of community activities. He is a committee man with the Cub Scouts (1250); bowls one night a week in a league (1250); plays "blooper ball" (a form of softball) in a league two nights a week in the summer (1250); is a member of the Knights of Columbus (1251); attends church regularly; belongs to the Ushers Club at the church (1251); is a member of the Veterans of Foreign Wars and of the Rogers City Servicemen's Club (1251-1252); has been a boy scout master (1265); is on the Board of Rogers City Community Development (1265); and has acted as the manager of a little league baseball team (1265).

Przybyla and his wife lead an active social life. Przybyla testified that following bowling, he often goes to the Deer Hunt Inn in Rogers City and to the Grove in Alpena, approximately 25 to 30 miles from Rogers City, "to have a few beers" (1249, 1252). He also stops at the Deer Hunt Inn and the Grove on other occasions to entertain car customers (1249). Mrs. Przybyla testified that she and her husband often had social engagements and that the neighbors have not been aware of any difficulties in their home life (1278).

From the evidence presented at the hearings, the principal problems confronting Przybyla are difficulties with his wife due to his frequent absences from the family home. However, as found by the Commissioners at page 69 of their report (130):

> "Mr. Przybyla had emotional problems before May 7, 1965."

Further, the District Court found Przybyla's wife had always been a "dominating personality" and that there were family difficulties before the sinking (127). The District Court also found these difficulties were aggravated by a bladder or kidney infection Mrs. Przybyla contracted in 1965 which had affected her attitude towards sex (128).

Przybyla has missed no time from work for medical reasons and has sought no medical treatment of any kind since May 7, 1965 for any conditions of claimed ill-being (1254-1255, 1261). His *one* visit to a doctor after May 7, 1965, was on May 21, 1965, when he saw Dr. Jackson the U.S.P.H.S. doctor in Rogers City for examination only.

The District Court found Przybyla suffered "severe emotional damage and moderately severe physical injuries as a result of the sinking of May 7, 1965." There were no further findings (130).

The District Court awarded Raphael Przybyla $196,-288. Of this amount, $99,000 was awarded for loss of earning capacity, $15,000 for pain and suffering sustained during the sinking, $55,000 for residual pain and suffering and loss of life's pleasures, $15,600 for the cost of future medical services, and $11,688 for maintenance and cure (130-131).

(d) Claim of Ronald Piechan (Award: $82,160).

On May 7, 1965, Ronald Piechan was 37 years old and unmarried (1164). He attended Central Michigan University for three years and then began work on U.S. Steel laker vessels in 1951. He started as an Oiler, became an Assistant Conveyorman and was promoted to Conveyorman in 1957 (1165). He has sailed regularly as a Conveyorman on U.S. Steel sheeps from 1957 to the present time (1165).

Mr. Piechan's experience with the sinking was like the others, except unlike the others, Piechan refused to go to the hospital for an examination (1170).

Piechan returned to regular employment aboard a U.S. Steel vessel on May 24, 1965 after he was certified fit for duty by the U.S.P.H.S. doctors in Rogers City (1172). Since that time, Piechan has not missed a single day from work or a minute from any watch due to *any*

condition of ill-being (1183). He has not lost a single day's wages. He has maintained the same position, that of Conveyorman, that he held for twelve years prior to the sinking, a position which represents the peak of his particular employment classification (1183). During the winter, he continues to work on the conveyor machinery aboard the vessel (1184).

Piechan's earnings from sailing, as shown by his income tax returns and U.S. Steel's accounting records, for the years from 1960 to 1967 are as follows: (Piechan Ex. 2A—2F, Piechan Def. Ex. 10, 1235).

Year		*Earnings*
1960		$9,689.87
1961		$9,730.42
1962		$9,610.38
1963		$9,710.38
1964		$9,689.68
1965	*(Sinking)*	$11,034.99
1966		$9,887.00
1967		$9,546.03

Piechan testified he has never complained to any of his superiors about any disability which prevents him from standing his regular duty watch (1185), that he gets along with his fellow officers and the crew (1187), that he talks with them (1187), that he, as a gang boss, gets along with his work gang in the winter, and that the men who work under him in the winter like him (1187).

Moreover, Piechan enjoys the same past-times and social relationships as he did prior to May 7, 1965. He enjoys hunting, fishing and playing Spitzer, a card game popular in Rogers City (1182).

When he testified at the hearings below, Mr. Piechan complained of some difficulties with his knees and right hand which "come and go (1173-1175). Since the sinking, he has received sporadic medical treatment for these

conditions. He did not see a doctor in connection with his knees until *six* months after the sinking, in October of 1965 (Piechan Ex. 7). He saw Dr. Jackson of Rogers City two or three times and he also saw Dr. Reis of Rogers City a few times in 1966 (1174). The condition in his knees was diagnosed by the treating doctors as arthritis and rheumatism (Piechan Ex. 7). His difficulties with his knees and hands have not been sufficient to cause him to lose any time from work or to interrupt normal off-duty activities such as hunting, fishing and playing Spitzer (1182). Moreover, Piechan has a history of knee difficulties and underwent surgery in 1963 for a cyst on his left knee (1166).

This is not surprising in view of the nature of Piechan's work which involves manual labor performed in a damp and cold tunnel running through the hold of the ship, far below its deck, where it is necessary to crawl to perform the work (1179-1180). Medical assistance for his knees and hands has been provided to Piechan at no expense by the United States Public Health Service in Rogers City.

Since May 7, 1965, Piechan has sought no psychiatric assistance and the record contains no evidence that he might do so in the future. Indeed, both psychiatric experts agreed Mr. Piechan had no current emotional problems. As found by the District Court (134):

> "Interestingly, both psychiatrists agreed that minor psychological problems were created immediately after the sinking which were caused by the sinking. Also that a good recovery was revealed at present."

The District Court concluded (134):

> "We find that claimant Piechan suffered temporary disability from his experience of May 7, 1965, with only slight disability of any permanent nature."

Ronald G. Piechan was awarded $82,160 as compensation for these "slight" disabilities: $26,000 for loss of earning capacity; $15,000 for pain and suffering incurred during the incident of May 7, 1965; $31,800 for residual pain and suffering and loss of life's pleasures; and $9,360 for future psychiatric medical expenses (135).

(e) Claim of Billy R. Holley (Award: $251,976).

Billy R. Holley was 37 years old on May 7, 1965, married and the father of three children. A former Coast Guard enlisted man who was stationed near the Straits of Mackinac, the scene of the sinking (1038), he started sailing for U. S. Steel in 1955 (1010). In those ten years, he served as a Stokerman, the second lowest engine room position (1010-1011). Following the sinking, Holley resumed sailing for U. S. Steel as a Stokerman and continues to work regularly in this capacity.

Holley's experience with the sinking was similar to the others and like the others, Holley was soon taken aboard the *Weissenburg*, given hot tea and a change of clothes, and transferred to the *Mackinac* (1015). He arrived ashore at Mackinac City in the afternoon of May 7 (1016), where he was examined and released to return home (1016).

After his return home in the afternoon of May 7, Holley went to the hospital and stayed overnight for observation and treatment of back pain. He was released the following day and remained home several more days awaiting reassignment. On June 3, 1965, after being certified as fit for duty by the U.S.P.H.S. doctor in Rogers City, Holley resumed sailing (137). Holley claimed he was somewhat nervous and had some difficulty adjusting to his return to sea during that summer which caused him to lose some time from work. In the period from June 3

through August, 1965, Holley lost a total of fourteen working days (137).

After August of 1965, he sailed continuously through the remainder of the 1965 season. In 1966, Holley had a recurrence of a pre-existing hemorrhoid condition unrelated to the sinking which caused him to miss a few days' work. Other than this one absence, Holley sailed regularly during the 1966 shipping season (1036). In 1967, Holley missed no work due to illness (1036). Holley's earnings for the relevant years have been as follows:

Years		*Earnings*
1960		$8,018.56
1961		$8,221.15
1962		$7,855.00
1963		$8,289.80
1964		$7,516.86
1965	*(Sinking)*	$8,874.45
1966		$9,195.25
1967		$8,138.55

Holley testified he gets along with the men on the ship and does not quarrel with them (1037). He has always had a roommate on the ship with whom he has gotten along (1037). This is in contrast to Holley's prior work history. In 1962, the Chief Engineer asked that Holley be taken off his ship because he was a trouble maker (1037, 1038, 1057, Holley Def. Ex. 3). Holley testified that he now gets along well with his superiors and they have not complained about his disposition or performance (1057-1058).

Holley was elected a member of the union negotiating committee by his shipmates in the years 1964, 1965, 1966 and 1967 (1050) and he has served as ship's delegate since 1965 (1050) and on the grievance committee (1050).

Holley testified that he has "lots of friends in town" as well as "good neighbors" (1054). He attends church

regularly, is a member of the Masonic Lodge and the Serviceman's Club in Rogers City (1041). Holley testified he has never been separated from his wife and has never considered a divorce (1038). Holley takes his wife out to the Deer Hunt Inn, the Grove in Alpena, and to the Gold Front, Two-Mile Inn and other places in Cheboygan, Michigan (1040-1041).

Holley has seen doctors on several occasions since May 7, 1965. However, this is consistent with his medical history prior to May 7, 1965, when he sought treatment for the same ailments.

Holley's principal complaints since the sinking have been difficulties with his back, nerves, a rash in the groin area (which he related to nerves) and stomach difficulties. Holley had all these problems before the sinking. His first back trouble in 1959 disabled him for ten to fifteen days (1011), and x-rays taken after the sinking showed the condition of his back to be the same as it had been following the accident in 1959 (Holley Def. Ex. 12). Holley complained of a rash following the Cedarville sinking. He also had a rash in the groin area in 1962 as a result of his father's stroke (1012). Holley also had stomach pains in 1962 (1012).

A complete review of Holley's medical history reveals he saw a doctor three times in 1958 for a variety of complaints including skin difficulties (1034), that he saw a doctor seven times in 1959 for complaints including his back pains (1034), and that he saw a doctor once in 1960 and twice in 1961. Holley saw a doctor on eight occasions in 1962, including visits for stomach pains and his rash (1035). In 1963, he saw a doctor three times, including a visit for hemorrhoids, which were apparently related to the stomach difficulties (1035). Holley made two visits in 1964, one of which concerned the hemorrhoid condition (1036).

Holley has never sought or requested psychiatric assistance. Moreover, all treatment received by Holley since May 7, 1965 was provided at no expense by the U.S.P.H.S. doctors in Rogers City (Holley Ex. 8). Holley expressly disavowed any additional maintenance and cure was due him (1046).

The District Court found that Holley "sustained permanent physical and emotional injuries of severe degree" as a result of the sinking (140). There was no other description of the nature of these injuries and no attempt to specify how these injuries have affected Holley except to state that he is nervous, irritable and has difficulty sleeping (137).

The District Court awarded Billy R. Holley more than a quarter of a million dollars. Of that amount ($251,976), $132,000 was awarded for loss of earning capacity, $20,000 for pain and suffering experienced during the sinking, $73,000 for other residual pain and suffering and loss of life's pleasures, $11,376 for maintenance and cure and $15,600 for the cost of future medical expenses (140-141).

(f) Claim of Michael Idalski (Award: $89,420).

On May 7, 1965, Michael Idalski was 50 years old. He began his career on U. S. Steel ships in 1933 as a coal passer and has worked for no other company. When the *Cedarville* sank, he was a Third Assistant Engineer (1353-1354).

Idalski's experiences during the sinking of the *Cedarville* were like those of the other claimants. He was taken to the hospital, examined, released and returned to his home in Rogers City by late afternoon (1358-1359).

Idalski initially complained only of abrasions and contusions to his left elbow and leg immediately after the sinking (Idalski Ex. 8). He saw the U. S. Public Health

Service doctor on three occasions for treatment of his knee and elbow, on May 10, May 14 and June 1, 1965. On this last occasion, Idalski was pronounced fit for duty and he resumed sailing aboard a U. S. Steel ship on June 3, 1965 (1361, 1391; Idalski Def. Ex. A).

Except for an absence from June 11, 1965 to August 21, 1965 due to a hernia operation, unrelated to the sinking, Idalski did not miss one day of work due to sickness from June 3, 1965 to the date of his testimony in these proceedings (1397, 1399-1400).

Idalski was promoted to Second Assistant Engineer in August of 1966 and has served as such to the present time. He had been passed over for promotion several times prior to the sinking (1391-1392), and he has now reached his career peak because he is not licensed to serve as First Assistant Engineer.

Idalski testified he has no trouble with the men serving on the ship (1391) and that he gets along with his fellow officers (1392). He also stated that he feels he is fit and competent to serve as an officer and that he has experienced no difficulty in performing his duties (1373). Although past 50 years old, Idalski often works with heavy weights, lifting several hundred pounds on occasion.

His earnings record has been as follows (Idalski Ex. Nos. 2-A—2-G and 5):

Year		*Earnings*
1961		$12,140.90
1962		$13,361.22
1963		$14,694.86
1964		$14,409.93
1965	*(Sinking)*	$12,784.39
1966		$13,980.31
1967		$16,503.07

Idalski testified that he enjoys a normal relationship with his wife (1389) and exchanges social visits with his

friends (1389). He also testified that he has a warm relationship with his children and grandchildren (1401).

Since June 1, 1965, Idalski has not sought any medical assistance of any kind for any condition allegedly resulting from the sinking (1370-1374). Idalski saw doctors for other ailments, such as the hernia operation mentioned above. Idalski also saw a doctor on two occasions in 1967: once to obtain a flu shot and once to seek treatment for sharp chest pains which he admitted had no relation to the sinking (1396). Idalski also admitted that, during these consultations with doctors, despite the claimed pain in his legs, elbow and shoulder, his alleged nervousness and his claimed lack of sleep, all of which, according to him, were getting progressively worse, he failed to mention any of these conditions (1396).

The District Court made only cursory findings in connection with the Idalski claim. After summarizing the testimony presented by both sides, the District Court concluded (144):

> "We determine that the claimant Idalski was injured on May 7, 1965, and was damaged thereby."

The injuries are not further specified or described.

The District Court awarded Idalski $89,420. This included $12,000 for loss of earning capacity, $10,000 for pain and suffering experienced during the sinking, $51,260 for other residual pain and suffering and loss of life's pleasures, $4,680 for future medical expenses and $11,480 for maintenance and cure (145-146).

(g) Claim of Walter Tulgetske (Award: $195,888).

On May 7, 1965, Walter Tulgetske was 44 years old. Although he had completed only the eighth grade, he had advanced by that date to the position of First Assistant Engineer of the *Cedarville*. Tulgetske's wife died in 1967; the couple had no children.

As the ship rolled to starboard, Tulgetske went into the water and was picked up by the *Cedarville's* lifeboat. As was true of the others, he was examined ashore by a doctor (his only complaints were that he was "numb and cold all over") (1546-1547) and released. He returned immediately to his home in Rogers City (147).

Tulgetske did not return to sailing immediately but helped search for the missing men (147). He was paid for his time off and then, as found by the Court below (147):

> "He returned to work on May 30, 1965 and has been sailing ever since."

In 1966, Tulgetske was promoted to Chief Engineer (1567). As Chief Engineer, he has performed all of his duties from the time of his promotion up to the present date (1553). He has handled many emergency situations, once going without sleep for over 36 hours to repair bearing trouble on his vessel (1554). Tulgetske testified he gets along with his fellow officers and the men who work under him and takes care of all personality conflicts in the Engineering Department (1555). Tulgetske stated repeatedly during the course of the hearings below that he believes he is qualified in all respects to serve as a Chief Engineer (1544, 1549, 1550).

Tulgetske's earnings over the past several years have been as follows (Tulgetske Def. Ex. 7, 1624):

Year		*Earnings*
1960		$15,208.32
1961		$17,069.62
1962		$19,626.16
1963		$19,091.77
1964		$19,740.00
1965	*(Sinking)*	$18,768.76
1966		$23,752.45
1967		$20,328.32

Tulgetske's home life has undergone significant change since the sinking; however, these changes are not connected with the sinking. As noted above, Tulgetske's wife died in 1967 (1565) and he now lives alone.

Tulgetske has not seen a doctor for treatment of any condition of ill-being since the sinking except a chiropractor he has seen on a few occasions (1533, 1537). No doctor has prescribed any treatment or given him any medication (1544). During his testimony, Tulgetske stated expressly he had never complained to his employer about any condition of ill-being which he thought was a result of the sinking (1549,1553). He also acknowledged that free medical care was available to him through the local U. S. Public Health Service facilities in Rogers City (1545).

Tulgetske testified he saw Dr. Foley in Rogers City in the winter of 1967 to obtain a physical examination for life insurance. Dr. Foley asked several questions about Tulgetske's physical condition and past history, and Tulgetske failed to mention any of the numerous complaints he listed at the hearings below (1543). Asked why, Tulgetske stated (1542):

> "I wasn't going for treatment, I was seeking insurance."

The District Court made virtually no findings in connection with the Tulgetske claim. The District Court's discussion of the Tulgetske claim consists of a recitation of the testimony on both sides and the following (151):

> "We find that Walter Tulgetske sustained injuries on May 7, 1965 and that such injuries were the direct and proximate result of the sinking of the *Cedarville* in the Straits of Mackinac."

There was no attempt to describe the "injuries" Tulgetske sustained or the basis in the evidence for concluding he sustained any injuries.

The District Court awarded Tulgetske $195,888. Of this amount, $46,000 was awarded for loss of earning capacity; $10,000 was awarded for pain and suffering sustained during the sinking; $120,400 for residual pain and suffering and loss of life's pleasures; $11,688 for maintenance and cure and $7,800 for cost of future psychiatric expense (152-153).

II. DEATH CLAIMS.

We are concerned here with the claims of the dependents of three deceased seamen who were serving on the *Cedarville* on May 7, 1965. Their names, positions and the amounts awarded by the District Court are as follows:

Stanley Haske	Wheelsman	$308,702
Arthur Fuhrman	Deckwatch	338,095
Eugene Jones	Stokerman	149,414

Circumstances of Death.

The record is devoid of any evidence as to the specific circumstances of the deaths of these three men. In particular, there was no evidence decedents underwent any conscious pain and suffering prior to death.

Family Relationships.

Each of the decedents left a widow and minor children. There was general testimony by each of the widows to the effect that her particular husband was a loving husband and attentive to the minor children. Jones had adult children, none of whom resided with their parents.

Remarriages.

An offer of proof was made by the shipowners that the widows of Arthur Fuhrman and Stanley Haske had remarried within two years after the death of their husbands and that, at the time of the hearings in these proceedings, these widows were living with their new husbands (508-509, 556-567).

Earnings Histories.

The gross earnings of the decedents in the years prior to 1965 were as follows:

	Fuhrman	Jones	Haske
1960	$5,902	$7,725	$8,411
1961	$4,632	$7,999	$8,156
1962	$5,014	$7,412	$8,050
1963	$7,044	$8,650	$8,213
1964	$5,889	$7,428	$7,856
5 Year Average	$5,696	$7,843	$8,137

The District Court found that these men would have realized the following gross earnings for the year from May 7, 1965 to May 7, 1966:

Fuhrman	Jones	Haske
$8,200	$8,600	$8,200

The relevant union contracts relating to Fuhrman, Haske and Jones (Kierzek Defense Exhibits 10 and 11) established the following hourly wage rates for the periods indicated for the job categories occupied by these men:

Job Classification	April 30, 1963 February 1, 1966	February 1, 1966 January 1, 1968	January 1, 1968 January 31, 1969
Wheelsman (Haske)	2.21	2.34	2.405
O.S. Deck Watch (Fuhrman)	1.86	1.99	2.05
Stokerman (Jones)	2.17	2.30	2.365

In the six year period from April 30, 1963 to January 31, 1969, there were two wage increases, one of 13 cents per hour or approximately 6% in 1966, and a second of 6 cents per hour or approximately 2½% in 1968. In all, the wage rates increased a total of 8% in the period from 1963 to 1969 or at a rate of approximately 1½% per annum and not the 4-5% per annum increase assumed by the District Court for these men.

As can be seen from an examination of the actual earning figures of these men wage rate increases did not translate themselves into proportionate actual earning increases. All of the unlicensed decedents earned less in the year immediately preceding their deaths, 1964, than they had in 1960. The reason, of course, is the varying length of the Great Lakes sailing season and the amount of overtime available.

The District Court further increased the assumed earnings of each decedent for the period after May 7, 1969, by adding a factor ranging from 2 to 4% of earnings for "personal productivity improvement and general economic development" without any basis in the evidence.

Fringe Benefits.

After computing estimated future earnings as outlined above, the District Court added additional increments to earnings to compensate the surviving families of the decedents for lost fringe benefits. The decedents, the percentages by which their earnings were increased for lost fringe benefits and the amount of the increments thus computed were as follows:

	As Percentage of Before Tax Income	*Value*
Eugene Jones	40%	$26,827
Stanley Haske	15%	27,717
Arthur Fuhrman	15%	32,660

The District Court did not specify the fringe benefits considered in making these awards and, in fact, stated that the fringe benefits were "impossible to evaluate authentically" (99).

Income Taxes.

The income tax returns of the three decedents were introduced in evidence as were the accounting records of U. S. Steel relating to these decedents. These documents show the amounts withheld from the wages of the decedents for income and other taxes in the years prior to their deaths. In the case of Jones, the applicable percentage was 12% of Jones' pay (Jones Def. Ex. 10) and in the cases of Haske and Fuhrman, 10% (Haske Def. Ex. 10; Fuhrman Def. Ex. 10). In addition, on October 1, 1967, the State of Michigan enacted a personal income tax and cities in that state have been authorized to levy such taxes.

Life Insurance Proceeds and Social Security Benefits.

The surviving families of the decedents were paid the proceeds of life insurance policies provided by U. S. Steel for its employees and were entitled over the years to receive Social Security benefits as follows (Fuhrman Def. Ex. 10; Jones Def. Ex. 10; Haske Def. Ex. 10):

	Social Security Benefits (Value at Death)	*Employer Paid Life Insurance*
Fuhrman	$49,936	$3,000
Haske	$36,720	$3,000
Jones	$23,551	$3,000

Promotion Prospects.

The three decedents, Fuhrman, Jones and Haske on May 7, 1965, held positions that they had held for years and the same as those which they could have been expected to hold over the next several years.

As of May 7, 1965, Jones had worked as a Stokerman, the second lowest engine room position, for over 20 years without promotion. Stanley Haske stood at the absolute bottom of the seniority list for Wheelsman and had no license which would entitle him to sail as an officer, his next logical step up the promotion ladder. Accordingly, he had no prospect to serve in any position other than a Wheelsman. Arthur Fuhrman, a Deckwatch, similarly had taken no action to obtain his First Class Pilot's license and had "limited" prospects of advancement (97-98).

Future Uncertainties.

Evidence was introduced of the uncertain nature of life itself. Actuaries have developed tables which show the probabilities of death at various ages and these tables were introduced into evidence (Haske Def. Ex. 10, Fuhrman Def. Ex. 10, Jones Def. Ex. 10). According to these tables, on May 7, 1965, the decedents here had the following percentage chances of dying prior to age 65:

Decedent	*Age on May 7, 1965*	*Percentage Chance of Death Prior to age 65*
Stanley Haske	36	29.5
Eugene Jones	57	18.3
Arthur Fuhrman	29	30.4

Manpower Report No. 8, a 1963 publication of the U. S. Department of Commerce, was also placed in evidence (Haske Def. Ex. 9; Fuhrman Def. Ex. 9; Jones

Def. Ex. 9). This showed there were substantial probabilities of persons such as the decedents leaving the work force prior to age 65 for disability, early retirement or any other reason.

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1475.

BARBARA J. FUHRMAN, Administratrix of the Estate of Arthur J. Fuhrman, Deceased, et al.,
Petitioners,

v.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S.

PETITION FOR REHEARING.

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
J. HAROLD TRAVERSE,
FREEDMAN, BOROWSKY AND LORRY,
Lafayette Building, 8th Floor,
Philadelphia, Pennsylvania. 19106
Counsel for Petitioners.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1475.

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Petitioners,

v.

UNITED STATES STEEL CORPORATION

and

DEN NORSKE AMERIKALINJE A/S.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

This petition for certiorari was filed on behalf of seven personal injury claimants and three death claimants.

These claims arose out of a collision between the S/S "Cedarville" and a foreign vessel, the M/S "Topdalsfjord", on May 7, 1965 in a fog in Lake Michigan. Instead of evacuating the crew from the rapidly sinking "Cedarville" to another vessel which was standing by, the Captain, after a 15-minute delay and after telephone messages to the shore, proceeded in the fog to try and "beach" the vessel, which

was then proceeding at the rate of two miles per hour. The "Cedarville" shortly thereafter convulsed, turned over and sank, hurling the crew on deck into the icy waters, and taking those who were beneath the decks to their death.

Respondent shipowners filed petitions for limitation of liability, which were denied by Trial Judge James Connell, who then conducted hearings on the question of damages and allowed claimants to prove their injuries through the testimony of a psychiatrist and an orthopedist who had examined the claimants and, at the trial, testified to their injuries based on their examination and history. Judge Connell thereafter rendered specific awards to the individual claimants. The Court of Appeals for the Sixth Circuit reversed Judge Connell's holdings almost in toto, in complete conflict with the principles of law enunciated by this Court and by other Courts of Appeals. The Court below committed a further shocking act by remanding the case with instructions to re-evaluate the case on the basis of the existing record, after having excluded the testimony of the psychiatrist and the orthopedist.

This petition for certiorari was denied by this Court on May 17, 1971 with Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan stating that certiorari should be granted.

I. Even if we were to assume the correctness of the decision of the Court below in remanding the case to the trial court, under the decision of this Court in *Byrd v. Blue Ridge Rural Electric Company Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958), the remand must allow the parties to introduce new evidence concerning any fact issue ruled on by the Court of Appeals.

In the *Byrd* case, this Court reversed the Court of Appeals and directed that the case be remanded with the right on the part of the parties to introduce new evidence in

connection with the disputed issue. Cf. *Fountain v. Filson*, 336 U. S. 681, 93 L. Ed. 971, 69 S. Ct. 754; *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, 93 L. Ed. 1704, 69 S. Ct. 1326; *Globe Liquor Co. v. San Roman*, 332 U. S. 571, 92 L. Ed. 177, 68 S. Ct. 246; *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849, 67 S. Ct. 752.

Apparently the Court of Appeals, in excluding the testimony of the psychiatrist and the orthopedist, rested its conclusion on the principles of law followed in the state courts of Ohio that the testimony of experts must be based on a hypothetical question rather than on history elicited from the claimants. This Court stated, in *Garrett v. Moore-McCormack Lines, Inc.*, 317 U. S. 239, 87 L. Ed. 239 (1942), where the Supreme Court of Pennsylvania had ruled valid a seaman's release under the state rule of evidence, that the evidence to invalidate a release must be "clear, precise and indubitable". The Supreme Court of the United States reversed that holding and applied the admiralty rule that the burden of proof is on the shipowner to prove the validity of the release. The Supreme Court made crystal clear the fact that the body of federal law applied, since the cause of action arose under the federal law, and the federal rules of evidence, including admiralty, applied to the exclusion of the state law. In this case the law is clear that on remand the parties had a right to introduce new evidence to replace that which the reviewing court had held to be erroneously admitted. Unless this is done here, a grave injustice will be done because the parties will be deprived of their rightful benefits due from the injuries received in the disaster. Upon this ground alone certiorari should be granted to correct a grave injustice.

II. In setting aside the fact findings of Trial Judge Connell, the Court of Appeals below committed clear and grave error in violation of the rule laid down by this Court in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20

(1954). The rule does not permit the Court of Appeals to substitute its judgment for that of the fact finder if the record supports the findings of the fact finder. The action of the Court of Appeals was a complete misapplication of F. R. C. P. 52(a) and the "clearly erroneous" doctrine, as defined by this Court in the *McAllister* case. The record completely supports the holdings of the commissioners, one a dean of a law school and the other a former judge. These commissioners saw and heard the witnesses and were in the best position to judge their credibility and weigh the evidence. Their findings were reviewed by Trial Judge Connell and affirmed. The Court of Appeals cannot simply wash away those findings by stating that upon a review of the whole record the findings are erroneous. The record does not justify any such conclusion.

The Court of Appeals simply cited one incident from one of the cases and failed to analyze in its opinion the record itself. The record completely supports the commissioners, as Judge Connell found, and must be sustained under this Court's decision in *McAllister*. Upon this ground alone certiorari should be granted and the decision below reversed.

III. The holding of the Court below that the testimony of an expert based on history of the claimant is inadmissible is in conflict with the decisions of the Court of Appeals from other circuits. In the Second Circuit, the Court of Appeals, in *Reid v. Quebec Paper Sales and Transp. Co.*, 304 F. 2d 34 (1965), held the testimony of experts based on history to be admissible. The Seventh Circuit Court of Appeals ruled the same way in *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (1963). The District of Columbia Circuit ruled such evidence to be admissible in *City-Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (1962) and *Kaufman v. Kaufman*, 164 F. 2d 519 (1947). In view of the conflict of the

Court below with the decisions of other Circuits, this Court should grant certiorari in order, *inter alia,* to preserve uniformity.

IV. The Court of Appeals below erred also in overruling Judge Connell in his holding on the law of future earning capacity. The Court below took as the measure of future loss the average earnings for the past number of years. This clearly was not the measure of earning capacity since it failed to take into consideration the amount which the claimants would have earned immediately after the accident and in the future based on the inevitable wage increases which seamen have received since time immemorial. The record establishes that the wage rates in United States Steel increased on the average of five per cent annually. The present economic situation inevitably requires a holding that wage rates have in the past and will in the future increase not merely five per cent but by an amount greatly in excess of that figure. These are the factors which must be considered in determining loss of earning capacity. The Court of Appeals below grievously erred in ignoring this principle. Certiorari should be granted on this point alone.

The Court below short-changed the claimants in failing to allow future benefits based on increased earnings while at the same time it directed that all awards be reduced to present value. The future increases in earnings more than offset the discount in reducing the awards to present value. The Court of Appeals was therefore clearly in error in holding that the awards must be reduced to present value, while at the same time failing to make any allowance for increased future earnings.

V. The Court below erred in its interpretation of this Court's decision in *Michigan Central R. R. v. Vreeland,* 227 U. S. 59, 57 L. Ed. 417 (1913), which specifically recognized

that pecuniary loss includes awards to widows upon proof of loss of care, guidance and consortium. This Court, in *Michigan Central,* specifically so held.

VI. The Court of Appeals also reversed Judge Connell in his award of pre-judgment interest. This decision was in direct conflict with the decisions of other circuit courts, including the Second Circuit in *Petition of City of New York,* 332 F. 2d 1006 (1964), and *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (1961), wherein the Second Circuit held that pre-judgment interest in these admiralty cases is required. In this connection, even if the right to pre-judgment interest is a matter of discretion with the court, it must be noted that Judge Connell exercised that discretion in favor of an award. The Court of Appeals was therefore grossly in error in overruling Judge Connell on this point also.

For the foregoing reasons, it is respectfully submitted that certiorari should be granted and the decision below reversed.

Respectfully submitted,

Abraham E. Freedman,
Martin J. Vigderman,
J. Harold Traverse,
Freedman, Borowsky and Lorry,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

Counsel for Petitioners.